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Joseph Stevenson.

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India. Laws, Statutes, etc. Procedural law

THE INDIAN EVIDENCE ACT,

NO. I OF 1872,

AS AMENDED BY ACT XVIII OF 1872,

TOGETHER WITH AN

INTRODUCTION AND EXPLANATORY NOTES, TABLE OF CONTENTS, APPENDIX, AND INDEX.

BY

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PREFACE TO THE SECOND EDITION.

In the present Edition some passages, which, in the Introduction and Notes of the former Edition did not sufficiently explain the meaning of the Act, have been set forth in a fuller and, it is hoped, a clearer manner; the Rulings of the several High Courts upon the Act have been embodied; and in the note on presumptions, under Section 114, the principal presumptions, judicially recognized in this country, have been arranged in a manner to allow of speedy and convenient reference. The opportunity has been taken to remedy the deficiencies, to which exception was justly taken in the original Index.

H. S. C.

1*st August* 1873.

PREFACE.

THE object of this work is to present in as concise a form as possible such a view of the recently-passed Evidence Act as may be intelligible and interesting to law-students and others, who have occasion to make themselves acquainted with that enactment.

However simple in arrangement and comprehensive in detail an Act may be, it cannot supersede the necessity of some previous acquaintance with the subject for which it provides, with the objects and reasons of its requirements, and with the principles on which it proceeds; and though the free use of Illustrations supersedes, to a large degree, the commentator's task, there must still be many points to which a student's attention may be usefully directed, mistakes against which he may be warned, and difficulties in which he may be glad of assistance.

Nothing either in the Introduction or the Notes can lay the least claim to originality. The Introduction is grounded on the Reports of the Select Committee and on the Speeches in the Legislative Council in which, at various stages of the Bill, Mr. Stephen explained its principles and arrangement. In the Notes, I have merely endeavoured to explain the connection of one section with another, to clear up any obscurities of expression, and to point out the respects in which the present measure differs from the English Common Law or from that previously in force in Indian Courts. I have occasionally introduced some of the more familiar English rulings, wherever it seemed that they would assist in the understanding or application of a section. In the Appendix I have collected a few measures connected with the subject of Judicial Evidence, which legal practitioners may find it convenient to have at hand.

To those who are already acquainted with the subject, I do not presume to offer assistance; they will find nothing in these pages which is not familiar to them; but I venture to hope that the large class of persons, who take up the study of the Law of Evidence for the first time, may find in this volume some assistance in mastering this important Branch of Legal Study.

H. S. C.

Madras, September 1, 1872.

LIST OF ABBREVIATIONS.

A. and E.	Adolphus and Ellis' Reports.
B. and A..	Barnewell and Adolphus' Reports.
B. and C.	Barnewell and Cresswell's Reports.
Beav.	Beavan's Reports.
Benth. Rat. Ev.....	Bentham's Rationale of Evidence.
Bomb. H. C. R....	Bombay High Court Reports.
B. L. R.....	Bengal Law Reports.
Broom L. M.....	Broom's Legal Maxims.
C. P. C.....	Civil Procedure Code, 1859.
Cr. P. C..	Criminal Procedure Code, 1872.
C. M. and R.	Crompton, Meeson and Roscoe's Reports.
C. and F.	Clarke and Fenelly's Reports, House of Lords.
C. and K..	Carrington and Kirwan's Reports.
C. and P.	Carrington and Payne's Reports, N. P.
E. and B.	Ellis and Blackburne's Reports, Q. B.
H. L. C..	House of Lords' Cases.
L. J., Q. B.....	Law Journal, Queen's Bench.
L. J., Ex.....	Law Journal, Exchequer.
L. J., C. P.....	Law Journal, Common Pleas.
M. H. C. R...	Madras High Court Reports.
M. I. A.....	Moore's Indian Appeals.
M. P. C. C.....	Moore's Privy Council Cases.
M. and G...	Manning and Granger's Reports, C. P.
M. and W.....	Meesson and Welby's Reports, Exc.
M. and R.	Manning and Ryland's Reports, Q. B.
Scott, N. R.	Scott's New Reports, C. P.
Suth. W. R.	Sutherland's Weekly Reporter.
Tayl...	Taylor on Evidence.
Y. and C...	Younge and Collyer's Reports.

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INTRODUCTION.

1. THE object of every Judicial inquiry is to produce in the mind of the Judge or other deciding authority, a belief as to the existence or non-existence of certain facts, on which the rights or liabilities of the parties and the decision of the case depend, and which are termed the facts in issue.

Object of Judicial inquiries.

2. This belief is produced by presenting to the Judge's mind various facts, which are the materials out of which his belief is to be formed. The Judge examines these various facts, and the grounds on which he is asked to believe them, weighs those which are contradictory against one another, estimates the corroborative effect of those which confirm one another, and decides at last which of them he wholly believes or disbelieves, which of them he considers partially true, which of them he thinks so doubtful that he puts them aside, what are the inferences suggested by those which he considers true, and what, upon the whole, he believes about the matter.

How is belief produced?

3. For instance a corpse, with a dagger wound in it, is found. A and B say that they saw C stab the man whose corpse it is: D and E say that at the time C was asleep in their house; F says that he sold a dagger, fitting the wound, to C the day before; G says that the dagger was sold to some one else; the footmarks at the scene of the murder correspond with C's; C on being questioned as to his absence from home, prevaricates; his clothes are bloody; there was a feud between his family and that of the deceased; there had been a quarrel, &c., &c. Now what the Judge does here is to get all this material before his mind and give each part of it its proper weight. How much importance is to be given to A and B's statement, how much to that of D and E? which is telling the truth F or G? Supposing the evidence as to the dagger, the

Illustration.

footmarks, and C's absence from home, and the prevarication in explaining it, the family feud, &c., to be true, what is the inference to be drawn from them as to his guilt? The result of this process is the Judge's belief.

Difficulty of forming belief in Judicial cases.

4. This process of forming a belief in Judicial cases is often very difficult and unsatisfactory; the degree of certainty attainable is not a high one; it always falls short of the absolute certainty attained by mathematical demonstration, and even of that high degree of certainty reached in scientific inquiries by means of experiment, comparison and other processes. A chemist, who suspects that a particular combination of substances produces some result, can go on experimenting till he arrives at a degree of certainty so high as to be almost demonstration; a geologist, who suspects that certain formations are produced by some particular physical causes, can look about elsewhere to countries where the same physical causes have existed, or where perhaps they at present are at work; a surgeon, who wants to be sure that one nerve has to do with sensation and one with movement, can go on trying till he has made sure. No such resource is available in judicial enquiries; it is on a certain limited number of facts that the conclusion must be based; and these facts are often too few and too untrustworthy to form a sound basis of conviction. A judicial inquiry, accordingly, is, as compared with a scientific inquiry, a very rough process; the risk of error is considerable, and the degree of certainty arrived at by it is scarcely ever such as would justify a man of science in saying that a thing was proved. The utmost that can be had in a judicial case is the independant testimony of respectable and disinterested witnesses, corroborated by circumstances which make it probable that they are telling the truth; but the most respectable and independant witness may be deceived, and the witnesses with whom a Judge has to deal are, in many instances, neither respectable nor disinterested. On the other hand, surrounding circumstances often so happen as to be most treacherous guides, as the well-known stories of the miscarriages of justice, occasioned by circumstantial evidence, sufficiently demonstrate. In many cases, moreover, there are no corroborative circumstances, and the judge has to pick out the truth from the statements of people, who, he knows, are trying to deceive him. In such cases his belief is scarcely more than the adoption of one of two conflicting improbabilities. He may have to say to the parties A and B, "Both of you

have been lying. Both your stories are improbable, but on the whole, I think, that a part of A's is the least unlikely, and I therefore decide in his favor."

A decision must be arrived at.

5. Still, however low be the degree of certainty attainable, a decision, one way or the other, must be forthwith come to. Here, again, judicial inquiries differ from scientific; the man of science constantly comes to the conclusion, that the material for an opinion is not available, and that his judgment must remain in suspense. His only knowledge about such a point is that he does not, and with his existing means, cannot know about it; he rests without any further opinion. But this the Judge cannot do; one way or other a decision must be given; if he acquits a man accused of murder, he takes the responsibility of letting a crime (if crime there has been) go unpunished, and turning a criminal loose on society; if he decides in favor of the defendant, because the plaintiff has not made out his case strongly enough, he takes the responsibility of keeping a man out of what may be his rights. A Judge must always decide something, and he must often do so on grounds which are very insufficient for a sound opinion.

What degree of probability is essential to belief.

Verdict of a jury.

6. Such being the Judge's position, what amount of certainty, or, to speak correctly, what degree of probability, is he to regard as essential to belief. The answer to this question is given in England by the extremely rough method of locking twelve average and presumably disinterested men into a room and obliging them by various stringent rules to come forthwith to a conclusion. According to this system a thing is "proved" when twelve average Englishmen, chosen by lot, can be induced, under the various conditions affecting trials by Jury, to come to an unanimous verdict about it.

In India the Judge to decide.

7. In India, except in the rare cases of Criminal trials by Jury, the Judge has the responsibility of deciding on the facts of the case thrown upon him. He must decide in each instance for himself whether the existence of the fact is "so probable that a prudent man ought under the circumstances to act upon the supposition of its existence,"* in which case he may treat it as proved; or "so improbable that a prudent man ought

* See definition of 'proved' and disproved in Section 3.

under the circumstances, to act on the supposition that it does not exist," in which case he may treat it as disproved: what that degree of probability is in each case is a question which the law cannot decide for him. The decision of this must depend on his own good sense, good judgment, insight and experience.

Test as to whether a thing is proved.

8. One test, by which to ascertain whether a thing is really proved or not, is to take the facts of the case, and see whether any other hypothesis, except that of the truth of the thing, whose proof in question, will explain them. If there is any such hypothesis within the range of ordinary probability, the thing cannot be regarded as proved. For instance A is accused of killing B. C gives evidence that he saw A follow B and stab him in the back and that B thereupon fell and died. Now here there are only three hypotheses which can be adopted about the case; either (1) C is telling a lie, or (2) he was deceived, or (3) A did kill B. Directly the first two hypotheses are disproved or shown to be so highly improbable that they may be treated as disproved, the truth of the third may be regarded as proved. Or, to take a somewhat less simple case, supposing that a person is found dead under such circumstances that (1) either A killed him or (2) some other person killed him, or (3) he committed suicide. Here again are three hypotheses any one of which, if true, would explain the facts of the case; it is only, therefore, when the second and third are got rid of that we are driven of necessity to adopt the first: we conclude that A killed the deceased as soon as there is no other reasonable theory on which we can account for his death; so long as any such theory exists, the fact of A's having killed him is not proved.

9. Such modes, however, of testing whether a thing is proved or not lie almost beyond the scope of our present inquiry; they are rather rules for the conduct of the reasoning process than rules of evidence, and belong to the province of the logician rather than to that of the legislator. The law does not and cannot teach a Judge how to think: it merely deals with the material of thought.

The law has at all times interested itself in the discovery of the truth.

10. The discovery of truth, both in Criminal and Civil cases, is a matter of such extreme interest to society that it is natural enough that, from the earliest times, the laws of every country should show signs of the anxiety of Government to regulate and assist it. Indeed

till rights can be to some extent ascertained and enforced and crimes discovered and punished, society can be scarcely said to exist.

Modes in which the Law assisted in the discovery of truth.

11. In the ruder stages of society the Law supplied various devices for the discovery of disputed facts which seem to us merely foolish or grotesque. Men were put to fight each other, or to submit to various ordeals by which it was superstitiously supposed that the real facts of the case would be revealed. Such tests are, it is needless to say, the very worst possible device for finding out the truth that the wit of man could imagine. The terror inspired by them may occasionally induce a guilty person to confess; but they act with equal force on the minds of the innocent, and are simply ready instruments for fraud, imposture, and cruelty. They have happily passed away, along with the other savage follies which characterize the uncivilized stages of human society.

Torture.

12. Another barbarous contrivance for getting at the truth, which the Law of England at one time countenanced was Torture. This methed was no doubt in many instances efficacious; it was practised up to a comparatively recent period of English history, and the utmost efforts of Government have not succeeded in preventing recourse being still occasionally had to it in this country. The objections to it are its brutality, its injustice, and the danger of leaving so powerful an implement of oppression in the hands of officials who are very likely to use it oppressively. It is, moreover, a most fallacious guide, as luckless wretches, in the throes of agony, have been frequently known to admit anything for the sake of immediate relief. At any rate the Law has now definitely abandoned it, as a means of discovering the truth, and has taken extraordinary precautions against its employment by the Police, whose duties might be likely to tempt them to make use of it.

Exclusion of witnesses.

13. Another mode in which the law used, in former times, to interfere considerably with the discovery of truth in Judicial Proceedings, was by the exclusion of particular classes of witnesses. Race, creed, profession, social position, sex, age, special diseases or bodily defects, interest in the matters in dispute, relationship to the parties concerned, have all at different times been regarded as grounds for disabling persons from giving evidence. The propriety of such disabilities was long

and hotly contested; the assailants of the system of exclusion pointed out that any rule of exclusion must often shut out witnesses whose evidence would be in the highest degree important and trustworthy; that it must be for the interests of Justice that the truth, by whoever spoken, should be known, and that the reasonable thing to do with evidence coming from a suspicious quarter, is, not to exclude it, but to take it for what it is worth.

This doctrine gradually gained way: one ground of disability after another disappeared; and it is now only in certain exceptional cases that any person is, according to English Law, disqualified from giving evidence.

In India, where the functions of Judge and Jury are almost invariably united, the unreasonableness of excluding any evidence was still more apparent, as the Judge is presumably a person skilled in dealing with testimony, thoroughly acquainted with the springs of human conduct and far more capable than a Jury of allowing to each person's statement its due weight and no more. In England certain evidence is excluded, not because it is worthless, but because Juries generally cannot be trusted to make a proper use of it, and therefore the only thing to do is to keep it away from them altogether. When the same official is Judge and Jury, such evidence may safely be admitted, for what it is worth. Accordingly, by the law of India as it now stands, every person, capable of understanding the questions put to him and of giving rational answers, is allowed to give evidence, whatever be his position or antecedents, his relation to the parties concerned or his interest in the result of the proceedings. Even accused persons are allowed to make statements and to be examined by the Court, though the untrustworthy nature of statements made under such circumstances is emphasized by their exclusion from the definition of "Evidence," and by the prohibition of the solemnity of an oath or affirmation. The present Act has carried this principle to its utmost length by providing in Section 30, that, where persons are being jointly tried, a confession by one of them, affecting himself and others, "may be taken into consideration" as against the co-accused as well as against himself. This has been objected to as dangerous; but a little consideration will show that, inasmuch as it is practically impossible to prevent such a confession having some effect on a Judge's mind, the safer course is to recognize this necessity, sanction his taking it into consideration, and

remind him at the same time how slight that consideration ought to be.

Pre-appointed Evidence.

14. At the present day one of the most important ways in which the Law assists in the discovery of the truth in Judicial Proceedings is by making arrangements before-hand for the preparation and preservation of especially good evidence, so that, if ever a dispute arise, the most trustworthy material for settling it will be ready to hand. This is what is done by the careful and elaborate record of Title to Land, the formation, maintenance, and correction of which forms so marked a feature of our land-revenue system. Whenever a dispute about land, succession, inheritance or family custom arises, the law has provided the means of obtaining the most authentic evidence on the subject. It is easy to see how enormous a help to the ascertainment of the truth and to the cause of justice is thus given, and how great a public injury is inflicted wherever, through the neglect of the Administration, this Record is allowed, as has unfortunately been the case in some parts of India, to become inaccurate and incomplete.

Record of Title.

Registration.

15. The same result is effected by the Registration Act, by which any person, interested in a document, has the means, at a small outlay, of placing its authenticity beyond dispute and so far arming himself with incontestably good evidence, should a dispute about it ever arise. With a view to increase the beneficial effects of Registration, the Law provides that, in the case of the more important classes of documents, it shall be compulsory; in other words it will not leave it to the discretion of parties to provide themselves with this superior order of evidence, or not, as they please; but in their own interests and those of society at large, compels them in every instance to do so.

Writing sometimes obligatory.

16. With a view to the same object the Law obliges people in certain important transactions, to record the matter in writing, and in some cases, to add the further security of attestation. Thus in cases to which the Indian Succession Act applies, a testamentary disposition of property can be proved only by a document attested in conformity to the requirements of the Act; so again, an acknowledgment of indebtedness, in order to take a case out of the operation of the Limitation Law must be in writing and signed. The object of these provisions is to compel people to resort to the safest possible

methods of recording their intentions, and so to facilitate the discovery of truth, should the matter ever come into dispute.

Declaratory Decrees.

17. Under the same heading may be placed the provision of the Code of Civil Procedure for declaratory decrees. Section 15 of that Act enables the Civil Courts "to make binding declarations of right without granting consequential relief," and thus a decree may be obtained, declaring the rights of a party who complains of no present wrong and asks for no immediate relief, but merely wants to have his position put beyond the possibility of dispute hereafter.

Suit for perpetuation of Testimony.

18. Further provision in the same direction might with advantage be made in the form of suits for the perpetuation of testimony, by which, in England, when a person has reason to believe that the testimony of some other person, which is of importance to him, is not likely at a later period to be available, he can get that evidence recorded with all the safeguards and solemnity incidental to a judicial proceeding.

Oaths.

19. Again the Law assists materially in the discovery of the truth by putting stringent compulsion upon any one, who knows about a matter under inquiry, to speak, and to speak the truth: it compels witnesses to come to Court, to answer questions, to produce documents. With a view to increase the chances of truthfulness, it, previously to the recent legislation, obliged witnesses, and it still allows them, to appeal to heaven, and to imprecate its displeasure upon themselves, if they are not telling the truth; it further enables the party to a dispute to make use of any oath which is considered especially binding by persons of his race or persuasion, so long as it is not offensive and does not purport to affect another person; the party may also offer to be bound by such an oath, if the opposite party will take it: thus the Law utilizes whatever incentive to truth-telling religion or superstition in any case can be supposed to give: and it brings an earthly incentive into play by punishing with heavy penalty any false statement.

Oaths not now compulsory.

20. The tendency of opinion of late years has been against the efficiency of oaths as a means of inducing truth-telling, at any rate against the propriety of making an oath essential to the validity of testimony. Various degrees of

relief were from time to time afforded to those whose consciences were offended by an oath. As long ago as 1840 Hindus and Mahummadans were exempted from taking certain oaths, which were considered objectionable, and a solemn affirmation was substituted for an oath. A similar indulgence was extended on various occasions in England to the scruples of several Christian sects. As the law now stands in this country Hindus and Mahummadans affirm; and all other persons swear, in such form as is, from time to time, prescribed by the several High Courts. Any person however may, without assigning a reason, object to an oath, and make an affirmation of the facts which he wishes to prove.

Law of Evidence connected with that of Procedure.

21. The law of Evidence is so essentially connected with that of Procedure, that various provisions of the Procedure Codes are really neither more nor less than rules of Evidence, and might with equal propriety be inserted in an Evidence Act: as, for instance, the Rule in Act VIII of 1859, which requires that all documents relied on in a case must be produced at the first hearing, the object of which is, obviously, to prevent evidence being manufactured as the case goes on; or, again, the provisions in the Code of Criminal Procedure as to the mode in which a witness' testimony and the accused's statement shall be recorded; as to the admissibility of depositions made at an earlier stage of the proceedings and the use that may be made of them; as to the mode in which a Civil Surgeon's statement may be proved, or evidence may be taken by commission in certain cases.

English Common Law.

22. The main body, however, of the rules affecting Evidence have been, up to the present time, embodied in the decisions of the English Courts, laying down the English Common Law on the subject, and in the text-books in which these decisions were collected and discussed. Several Acts of the Indian Legislature, passed from time to time, had modified the provisions of the English law in certain particulars; but they did not profess to set forth what the English Law was; and no complete or systematic enactment on the subject has hitherto found a place in the Indian Statute Book. This gap in the substantive Law of the country the present measure is intended to fill.

Arrangement of the Act.

23. The structure of the Act will be best understood by observing, that it is divided into three principal divisions, the first of which answers the question, "what is the permissi-

ble material of belief?" the second of which answers the question "how is that permissible material of belief to be brought to the Judge's mind?" and the third contains directions as to the examination of witnesses, points out on which party the burthen of proof is, in each case, to lie, and directs the Judge, in certain cases, to draw particular inferences from facts brought to his notice. This division is the main principle, on which the whole Act proceeds, and unless it is thoroughly understood and kept in sight throughout, the arrangement of the whole will be unintelligible.

Evidence of facts in issue always admissible.

24. The matter may be stated more fully thus. The production of a belief in the existence or non-existence of certain facts being, as we have seen, the object of every Judicial inquiry, and belief in the existence of a fact being the result of a mental process on certain materials presented to the mind, the first thing to be decided is what are those materials to be. In the first place, direct* evidence of the actual facts in issue will of course be admissible. Where the issue is whether a thing happened, the most obvious and direct way of producing belief in its occurrence is for some one, who is able to assert, of his own knowledge, that it did happen, to come into Court and say so. The only question which the Judge has then to settle is as to the degree in which the witness's account can be trusted: if the witness was not deceived as to what he saw, if he remembers it accurately, and if he is telling the truth, the fact is proved; as, for instance, fact in issue, "Did A kill B?" Witness, "I saw A take a knife and stab B in the heart, and B fell back dead." Here the only questions are, was the witness deceived as to what he saw, is his recollection inaccurate, is he lying? If not, the fact in issue is proved.

Relevant facts.

25. But, secondly, there are, surrounding every fact, a number of other facts which bear upon it, are connected with it more or less intimately, and in a higher or lower degree affect its probability. They are not facts in issue, but they are facts from which facts in issue may be inferred. They constitute what the Text-books term "circumstantial" evidence, as opposed to evidence of the actual facts in issue which is termed "direct"*

* This use of the word "direct" must not be confounded with the sense in which it it used in Section 60 of the present Act, where it is provided that oral evidence must in every case be "direct," *i.e.* be of something which the witness himself saw, heard or perceived by some other sense, or of which he was mentally conscious.

or "immediate;" they are, in every instance an important auxiliary to, and check upon direct evidence, and when plentiful enough, and strong enough, they may supersede it, altogether.

With facts of this character, however, the Judge has a two-fold process to perform; first, as with the other class, he has to decide on the accuracy and truthfulness of the witness; and then, assuming the accuracy and truthfulness of the witness, he has to decide on the proper inference to be drawn from the fact stated. Suppose, for instance, the fact in issue to be, "did A kill B?" and the evidence to be as follows; "A came running out of the house; he was much excited and splashed with blood; in his hand was a bloody knife; all the doors were locked but that out of which A came; no one else was in the house; B was lying on the floor with her hands tied behind her and her throat cut." Now in this case there is no direct statement of the fact in issue; the statement is of facts from which the fact in issue may be inferred, and the Judge has to decide, first, whether the witness is telling the truth, and secondly, if he is telling the truth, what is the proper inference to be drawn from the facts stated: assuming all that the witness says to be true, does it prove that A killed B?

Circumstantial Evidence.

26. Great emphasis has been laid on the distinction between these two classes of evidence, direct and circumstantial, and it has sometimes been urged that it is never safe to trust to circumstantial evidence in the entire absence of direct; in other words, that unless there is some one who is in a position to assert directly of his own knowledge that the fact in issue did happen, no amount of circumstantial evidence will justify the inference that it has happened.

27. But this is obviously going too far. There are many crimes which are committed under circumstances that preclude the possibility of evidence being given directly on the issue whether they happened or not, yet which allow of a perfectly safe inference been drawn from surrounding circumstances. A house is broken into and a golden cup stolen: ten minutes after, a man is caught with implements of house-breaking in one pocket and the cup in another: he can give no account of them or himself, he has been twice before convicted of house-breaking: duplicates of pawned property, proved to have been stolen, are found upon him: his guilt is surely just as certain as if twenty people came and

swore they saw him do it. Stories are often told of the mistakes to which circumstantial evidence, apparently of the most conclusive kind, has given rise. But the occurrence of such accidents proves nothing but that all Judicial decisions, however arrived at, are liable to error, and that all that can be done is to act as in each instance appears most reasonable. If circumstances sometimes lie, *i. e.*, so happen as to suggest a deceptive inference, how much oftener is a Judge led astray by the inaccuracy or fraud of witnesses in testifying directly to a fact in issue. In India, at any rate, it is more to the surrounding facts than to evidence given directly on a fact in issue that a Judge will look to ascertain the truth.

Corpus delicti.

28. It has been sometimes laid down by way of restricting the effects of circumstantial evidence, in the absence of direct evidence, that, in criminal cases, the "Corpus delicti," at any rate, should be proved by direct evidence, not simply be inferred from the surrounding circumstances. If a man is to be convicted of murder on circumstantial evidence, the fact of the deceased having come to a violent end should, according to this doctrine, be proved by direct evidence, as by the evidence of some one who inspected the corpse; if a man is to be convicted of theft on the strength of circumstantial evidence, it should first be proved by direct evidence that some one has been robbed. Great authorities may be quoted in support of this doctrine; but its unsoundness was demonstrated by Bentham, who pointed out that any such rule would merely have the effect of allowing murders to be committed with impunity in every case in which the victim's body could be successfully made away with; and so with every other crime. The fact is that it is in vain to invest any one of the facts of the case with an artificial value, and insist upon it as essential in every case to a conviction. It is easy to imagine cases in which the *corpus delicti* was not directly proved, and yet in which the prisoner's guilt would be beyond all reasonable doubt, and in which it would accordingly imply the grossest timidity to shrink from convicting. On the other hand, even supposing the *corpus delicti* to be directly proved, its proof disposes of only one of various hypotheses, on any of which the prisoner's innocence might be inferred, all of which must be shown to be untrue before a conviction can be justified: the fact that the deceased came to a violent end is, indeed, proved; but a great many other facts must be proved before

any one can be convicted of having murdered him; and there seems no reason why the one fact should necessarily be proved in a different way from the others.

Which of the surrounding facts are to be considered relevant?

29. But then the question arises, to which of the surrounding facts is a Judge to look, and where is he to stop? over how large an area of surrounding circumstances is his mind to travel in coming to a belief as to the fact in issue? Which of these surrounding circumstances is he to take into account, which is he to ignore? Some of them will affect the probability of the fact in issue in a high degree: some in a lower, but still appreciable degree, some in so low a degree as not to be worth notice.

Illustration.

Suppose for instance that A is prosecuted for the murder of B, and the surrounding circumstances to be these, (1) A is seen by C and D standing over B's corpse with a bloody knife in his hand, the blade of which exactly fits the wound in B's body; (2) he was known to have a violent grudge against B and to have threatened to kill him, (3) he was so circumstanced that B's death was of material advantage to him, (4) he was seen by one man going towards the scene of the murder shortly before its occurrence, and by another coming away shortly afterwards, (5) he left the village the evening of the murder having previously burnt his clothes, (6) he was of a hostile clan to B; (7) he was a man of notorious evil life, (8) he had twice before been convicted for crimes of violence, (9) he was surly, passionate and violent disposition and unpopular in his village, (10) there was a rumour that he had done it, (11) the general feeling in the village was that he was the guilty man, (12) somebody told somebody else that he believed A to be the murderer; (13) A's father and grandfather had both been convicted of homicide. Here are facts ranging in every degree of importance in their bearing on the facts in issue, from the very highest to the very lowest. Some of them, if true, produce a feeling almost of certainty; some, coupled with others, raise a strong presumption; some again, though not by themselves of great importance, do, when coupled with others, materially affect the probability of the case; some on the other hand, as, *e. g.*, 9, 10, 11, 12 and 13, suggest a probability so faint that it is more likely to lead one wrong than right, and ought therefore to be put aside altogether. Where is the line to be drawn? For a line must be drawn somewhere. "The Laws of

Evidence," said Lord Cranworth, "are founded on a compound consideration of what, abstractedly considered, is calculated to throw light on the subject in dispute, and what is practicable." On the one hand we want to discover the truth; on the other hand, since human life is short, and human powers are limited, we can devote only a limited amount of time and labor to its discovery. It is necessary, therefore, to prescribe a definite area, beyond which our investigations shall not extend. The facts which fall within that area are styled "relevant," and it out of these and these alone that the Judge's belief about the matter must be formed. These alone can be proved. What then are the rules for testing whether a fact is relevant or not? The answer to this question is given in Part II of the Act, Sections 5—55.

Meaning of the word "fact."

30. But, first, what is the meaning of a "Fact." "Fact" is defined as meaning (1) "any thing, state of things, or relation of things, capable of being perceived by the senses, (2) any mental condition of which any person is conscious." "Fact" will therefore include acts and events that can be perceived by the sense of the sight, statements which can be perceived by the sense of hearing, opinions, feelings and belief of which the mind is conscious: and we shall see presently that statements, opinions, feelings and beliefs are often relevant facts of the very highest importance.

Arrangement of relevant facts.

31. In forming an opinion about a fact, one would naturally consider

1*st.*—What has happened, or been done in connection with it,

2*nd.*—What has been said about it,

3*rd.*—What has been decreed in Courts of Justice about it,

4*th.*—What has been or is thought about it, and

5*th.*—What is the character and reputation of parties concerned.

Under these five headings, accordingly, all relevant facts have been arranged; under some one of them every fact, which claims to be relevant, must be shown to fall: many relevant facts moreover will fall under more than one of them, as the headings are all inclusive and not exclusive of one another.

32. A fact, then, is relevant, if it is so connected with a fact in issue as to form part of the same transaction, whether it happened at the same or at a different time or place, Sec. 6; if it is the occasion, cause or effect, immediate or otherwise, of a fact in issue or relevant fact; or constitutes the state of things under which such a fact happened, or affords an opportunity for the occurrence of a fact in issue or relevant fact, Sec. 7; so also facts showing motive or preparation for a fact in issue or relevant fact; previous or subsequent conduct of the parties; statements of the parties which accompany and explain conduct; statements, made to or in the presence of the parties, which affect their conduct, Sec. 8: so also are facts necessary to explain or introduce a fact in issue or relevant fact, or which rebut an inference suggested by such a fact, or which establish the identity of anything or person, whose identity is relevant, or fix the time or place at which any fact, in issue or relevant, happened, or which show the relation of parties by whom any such fact was transacted, Sec. 9; all acts and statements of conspirators in connection with, or explanation of the conspiracy, Sec. 10; facts that are inconsistent with a relevant fact or fact in issue, or which render any such fact highly probable or improbable, Sec. 11; or which enable the Court to determine the amount of damages when damages are claimed, Sec. 12: so too, when the inquiry is as to a right or custom, any transaction by which, and any particular instance in which such right or custom was created, claimed, modified, recognized, asserted or denied, exercised, disputed or departed from, is a relevant fact, Sec. 13; so also are facts showing the existence of a state of mind or body when such state of body or mind is relevant, Sec. 14. Again, when the question is whether an act was accidental or intentional, the fact that it formed part of a series of similar occurrences, is relevant, Sec. 15; and so is the course of business according to which the act, as to which the inquiry is, would have been done, Sec. 16; all these are relevant facts.

Acts and events when relevant facts.

33. The next class of relevant facts are certain statements; (Sections 17—39.) As a general rule the mere fact that some one has previously said something about the matter in dispute is, of course, wholly irrelevant; but there are certain conditions under which previous statements have a most important bearing on the probabilities of the case, and are almost

Statements when relevant facts.

the best evidence that a Court can have. Everything depends on the person by whom and the circumstances under which they are made.

Admissions.

34. The first kind of statements to be considered are Admissions. An admission is defined to be any statement, which suggests an inference as to a fact in issue or relevant fact, made by

By whom a statement must be made in order to be an admission.

(*a*) a party to the proceeding,

(*b*) an agent to such party, duly authorized,

(*c*) a person, who has a proprietory or pecuniary interest in the subject-matter of the suit, and who makes the statement in the character of a person so interested,

(*d*) a person from whom the parties to the suit have derived their interest,

(*e*) a person, whose position it is necessary to prove in a suit, when the statement would be relevant in a suit brought by or against himself,

(*f*) a person, to whom a party in the suit has expressly referred for information.

When statement must be made in order to be an admission.

In order however, for the statement, to be an admission it is further necessary, as to (*a*), in the case of persons suing or sued in a representative capacity, that the statement should have been made during the continuance of their representative character, and in the cases (*c*), (*d*), (*e*), that the statement should have been made during the continuance of the interest or position as to which the statement is made.

Admission is relevant against the person who made it.

35. The peculiarity of an admission is that it is relevant as against the person who makes it or his representative in interest, but not relevant, except in certain specified cases, on his or his representative's behalf. The reason of this is obvious. If A sues B for Rupees 50, the fact that B told some one else that he owed A the money, is a weighty piece of evidence as against B; he has every incentive not to make such a statement, and it is nearly certain that he would not have made it unless it were true. On the other hand, suppose that A has said, "B is no longer my debtor," that, for the same reason, is a weighty piece of evidence against A, and, supposing its authenticity to be established, its importance can hardly be overrated in considering the question of A's claim: For

who is so likely to know about the claim as himself, and who so little likely to understate it? But the fact that A has told some one that B owes him the money, or that B has denied the existence of the debt, is of no weight at all, because each of course makes the best of his case, and each, if such statements were admissible, would simply be manufacturing evidence in his own behalf. It is clear that the fact that A asserted or B denied the debt, on any number of occasions, does not in any appreciable degree affect the question whether there was such a debt or no.

What is the effect of an admission?

36. An admission, then, being relevant only against the person who makes it or his representative, what is its effect as against him? It is not, merely as an admission, conclusive; the person who made it may show that he was mistaken, or was not telling the truth, or may diminish the importance to be attached to it in any way he can; he is not precluded from contradicting it. Many admissions, however, become "estoppels," and then, as will be seen hereafter, (Sec. 115,) the person who made them cannot deny them. So far, however, as they are merely admissions, he may induce the Court to disbelieve them if he can.

Certain admissions may be proved by the person who made them.

37. We now come to the exceptions to the rule that admissions are relevant only against the person who made them and his representatives, and not in his or their favor. There are certain cases in which a person's admissions may be proved in his own behalf. In the first place there are certain statements, for which provision is made in Section thirty-two,* which are relevant, if the person, who made them, is dead, or for other good reason cannot be produced. Now any statement, which is of such a nature as that, if the person making it were dead or could not be produced, it would become relevant under Section 32, may be proved, as an admission by or in behalf of the person who made it. For instance a Captain is tried for casting his ship away. He produces his log-book, with entries by himself, showing that the ship was kept in her due course. It would appear at first sight that he could not make use of the entries, in his own behalf, as being admissions; but they are admissible, under the present exception as being entries made in the regular course of business, which are admissible whenever the person who made them cannot be produced.

* See *post* para. 42

When an admission as to relevant state of mind or body may be proved by person making it.

38. Again a man may, prove his own admissions on his own behalf, when the admission relates to a relevant state of body or mind, was made at or about the time when such state of body or mind existed and was accompanied by conduct rendering its falsehood improbable. A tradesman, for instance, wants to prove, that, at a particular date, he believed a certain Banker, A, to be solvent; he may for this purpose prove that about the time in question he said, "A is the safest Banker in the town," at the same time placing a large sum in A's hands.

39. Again an admission may be proved by the person who made it, when, under some other head of relevancy, it can be shown to be relevant otherwise than as an admission: a man, for instance, is accused of receiving stolen goods, knowing them to be stolen. He may prove his own refusal to sell them below their real value, because that refusal would be relevant under Section 8, as explaining conduct influenced by a fact in issue. Had he known them to be stolen, he would have been anxious to sell, though at a sacrifice, his conduct, therefore, in not wishing to sell is relevant, and so are his statements explaining that conduct. In like manner a man might prove his own statements, if they formed part of the same transaction with a relevant fact under Section 6, or were the occasion of a relevant fact under Section 7, or are necessary to explain it under Section 9.

Confessions of accused persons.

40. Under this heading provision is made for the confessions of accused persons. No such confession is relevant if it appears to have been obtained by means of any inducement, threat or promise, having reference to the charge, proceeding from a person in authority, and sufficient to make the accused person suppose that he would, by making it, better himself, in a temporal way, with reference to the proceedings. The provisions of the old Code of Criminal Procedure as to the inadmissibility of confessions to the Police, and of any confession made by a person in Police custody except in the presence of a Magistrate, are reproduced without material change. Confessions other than those expressly excluded are not irrelevant merely because made under a promise of secrecy, or in consequence of a deception, or during drunkenness.

41. Lastly, Judges are relieved from the attempt to perform an intellectual impossibility by a provision, that, when more persons than one are tried for an offence, and one of them makes a confession affecting himself and any other of the accused, the confession may be taken into consideration against such other person as well as against the person making it. Such a statement is, of course, in the highest degree suspicious; it deserves the least possible reliance: but none the less it is impossible for a Judge to ignore it, and he is now no longer obliged to pretend to do so. The exclusion, in fact, was one of those rules of evidence, borrowed from the English system, which, though well adapted to Trials by Jury, are meaningless and out of place on occasions where the functions of Judge and Jury are combined in a single official. The Indian Judge will, for the future, have simply to consider whether the confession ought to have any weight with him, and, if any weight, how much, in the opinion he forms about the case. The exclusion of confessions of this kind from the definition of "evidence" is intended, apparently, to remind the Judge that he is dealing with thoroughly unsound materials, and that, though he may take them into consideration, he must not rely on them as the sole or even as the chief basis of his belief.

Confession of co-accused.

42. Next follow certain statements, which, from their nature, become relevant facts, when the person who made them is dead, or for other good reason cannot be produced, or cannot be produced without a degree of expense and trouble which the Court considers unreasonable. These are:

Statement made by a witness who cannot be produced.

1. Statements by a person since deceased as to the cause of his death;
2. Statements made in the ordinary course of business;
3. Statements against a person's interest:
4. Statements as to the existence of any public right or custom or matter of public interest, made by a person likely to know of the existence of such right, custom or matter, and before any controversy about it had arisen:
5. Statements as to relationship by a person having special means of knowledge, made before the question in dispute was raised:

6. Statements as to relationship of deceased persons contained in Wills, Deeds, Pedigrees, on tombstones, family portraits, &c., and made before the question in dispute was raised:

7. Statements in Deeds, Wills or other documents relating to any transaction, in which some right or custom in dispute was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with the existence of such right or custom:

8. Statements by a number of persons of their feelings or impressions, when such feelings or impressions are relevant to the matter in question.

Statements in former Judicial proceeding.

43. In the next place statements made by a witness in a former Judicial proceeding are relevant facts when the witness is dead or cannot, without unreasonable trouble, be produced, and if

(1) the proceeding was between the same parties or their representatives,

(2) the adverse party had the right and opportunity to cross-examine,

(3) the questions in both proceedings were substantially the same.

Statements made under special circumstances.

44. There is another class of statements, which are relevant on account of the circumstances under which they are made, whether the person who made them is producible or not. Such, for instance, are entries in books of account, regularly kept in the course of business, subject however, to the condition that they shall not be sufficient evidence to charge any one with liability, without some independent evidence; entries in public records or registers by a public servant or other person in discharge of his duty; statements in published maps, or in maps made under the authority of Government; statements of facts of a public nature made in the recital of an Act of Parliament, or of any of the Indian Legislatures, or in a Notification in the Gazette of any Indian Government, the London Gazette or the Government Gazette of any English Colony; statements of the law of any country contained in a book published under the authority of the Government of that country, and published rulings of the Courts.

45. The next class of relevant facts are Judgments of the Courts of Law. These are often relevant facts of the highest importance. In the first place in Civil cases, a suit will be barred altogether if the same cause of action has been already disposed of by a competent Court, between the same parties or those through whom they claim; the matter has become "res judicata," and so long as the first judgment remains unreversed, the Law will not allow fresh proceedings to be taken by those whom the Judgment binds. Whenever, accordingly, under the provisions of Section 2 of the Code of Civil Procedure, a second suit is barred by reason of the cause of action having been previously adjudicated, the judgment, order, or decree, in which that former adjudication was expressed, is relevant.*

Judgments when relevant facts.

Res judicata.

46. In the same way an accused person may bar criminal proceedings against himself by showing that he has been previously acquitted or convicted by a competent Court on the same facts as those in respect of which he is being prosecuted. The Judgment of the Court by which he was acquitted or convicted, would, in such case, be relevant.

Former conviction or acquittal.

47. We have seen that civil judgments do not ordinarily preclude any one but the parties to the suit or their representatives from contesting the matter upon which they are pronounced. There are, however, certain very important exceptions to this rule. There are some judgments, the nature of which is not to define a man's rights against parti-

Certain judgments are conclusive against all the world.

* Exception has been taken to this part of the Act as incomplete, in not sufficiently disposing of the question as to the effect to be attributed to Judgments of the Courts. It is obvious, however, that, as the subject has been hitherto governed by Section 2 of the Code of Civil Procedure and the rulings of the Courts thereon, inconvenience would have been occasioned by Legislative interference with the effects of that section, when the section itself was not under discussion. That section, no doubt, requires, and in any future Edition of the Code will undergo amendment, so as to render it more explicit, and to provide for the effect of foreign judgments and other collateral topics. Meanwhile the student may content himself with the reflection that one of the most troublesome and unedifying Chapters of English Law has been reduced by these sections to absolute simplicity. The mist of inaccurate or unmeaning language which hung about the judgment *in rem* has been swept away; the "estoppel by record" has shared a like fate; and the area over which judgments can operate, the persons whom they can affect and their effect upon rights of litigation for the future, are defined with the utmost rigidity and precision. When Section 2 of the Civil Procedure Code has received the necessary amendment, complete and satisfactory provision will, it is believed, be found to have been made for every branch of this important subject.

cular individuals, but to declare his status generally, as against all the world. As to what these judgments are, and as to the grounds on which they operate not only as against the parties to the suit but as against all the world, the rulings of the English Courts and the various Text-books have, unfortunately, not been wholly free from indistinctness. While all parties agreed that judgments of this nature were to be called 'Judgments in rem,' the origin and real signification of that expression has been very partially understood, and it is difficult to reconcile the theories which have been enunciated by different English Tribunals on the subject. The subject was cleared of much of its difficulty by a learned Judgment of Mr. Justice Holloway in the Madras High Court, in which he explained the historical sources of the 'Judgment in rem,' and showed that its peculiar efficacy was originally derived, not from the nature of the judgment itself, as declaring status, but from the character of the action in which, and of the tribunal by which it was pronounced; and it is with reference to these considerations that the law, which will for the future regulate the subject in this country, has been framed.

Doctrine of the judgment 'in rem'

48. Section 41 of the Act provides that a final Judgment of a Court exercising Probate, Matrimonial, Admiralty or Insolvency Jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not against any specified person but absolutely, is conclusive proof that any legal character, which it confers, accrued at the time when the decree came into operation; that any legal character, to which it declares any person to be entitled, accrued at the time mentioned in the decree; that anything to which it declares a person to be entitled was that person's property at the time at which the decree declares it to be his.

Provisions of the Act, as to Judgments which are conclusive against all the world.

49. With the exception of the cases just noted, there will be, for the future, no judgments conclusive in Indian Courts against persons other than the parties to the proceedings or their representatives. There are, however, some judgments which, though not conclusive proof of what they state, and not binding upon anybody but the parties to them,

Judgments which, though not conclusive against all the world, are relevant as evidence of the facts stated in them.

may yet be considered by the Court by way of evidence as to the facts with which they are concerned. Such are judgments relating to matters of a public nature; as, for instance, in a suit, in which the existence of a public right of way is disputed, a judgment between other parties, in which the existence of the same right of way is affirmed or negatived, may be put in as evidence of the existence or non-existence of the right; though the party against whom it is employed will be at liberty to counteract it, if he can, as he would any other piece of hostile evidence.

Judgments relevant under some other provision of the Act.

50. Lastly, the existence of a judgment will sometimes be a relevant fact under some of the other provisions of the Act as to relevancy. The fact that A has obtained a decree of ejectment against B may be the motive for B's murdering A; or it may be necessary, for the purpose of proving A's position, to show that he suffered judgment to go by default against him at a particular time; or the fact of A's having prosecuted B for slander may explain the relations of the parties, and their state of mind on a subsequent occasion. In any such case the judgment will be a relevant fact.

Opinions when relevant facts.

51. The next class of relevant facts are "opinions." There are some cases in which, with a view to ascertaining the truth about a thing, it becomes important to know what people think about it. This is obviously a somewhat unsubstantial sort of proof, and it will be seen that it is only in very special cases, and under very strict conditions that 'opinions' are admissible.

Opinions as to matters of foreign law, science, art or handwriting.

52. In the first place it is often necessary for the Court in the course of an inquiry to be informed on some scientific matter, which is material to the decision, and this information can be supplied only by a man of science, specially versed in the subject. What are the symptoms of particular sorts of poison; could such symptoms be produced by any other cause; what would be the results of a certain blow in a certain part of the body; do particular symptoms commonly show unsoundness of mind, and is the unsoundness of mind so shown of such a nature as to render a person incapable of knowing the character of his acts; could a ship, seaworthy at one time, be in a specified condition of unseaworthiness at another; these and a hundred kindred questions are of daily

recurrence in the Courts, and can be answered only by the 'opinions' of those who possess special information about the subject.

Experts.

53. Such specially skilled persons are called Experts, and their opinions on any point of foreign law, science, art, or identity of handwriting are relevant, whenever the Court has to come to a decision with reference to any of these matters; moreover, when an expert's opinion is relevant, any fact, which supports or is inconsistent with that opinion, becomes relevant.

Opinions of persons possessing special means of information.

Handwriting.

54. In the next place there are some opinions, which, though not given by experts, are yet relevant as being the opinions of persons possessing special means of information. As to the identity of handwriting, the opinion of any person who is acquainted with the handwriting of the person, by whom the document is supposed to be written or signed, is relevant: and a person is said to be acquainted with the handwriting of another, when he has (1) seen him write, or (2) received letters purporting to be signed by him in reply to letters addressed to him, or (3) been in the habit, in the ordinary course of business, of seeing documents purporting to be signed by him.

General custom or right, &c.

55. Again when the question is as to the existence of any general custom or right, the opinions of persons, who would be likely to know of its existence, are relevant; and so, when the question is as to the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, the meaning of words or terms in particular places or by particular classes, the opinions of persons, having special means of knowledge thereon are relevant. On matters of relationship, moreover, the opinion, expressed in conduct, as to such relationship, by persons having special means of knowledge on the subject, whether relatives or not, is relevant, except in certain specified cases, for the purpose of proving such relationship. Thus, as a general rule, the fact of two people being man and wife, or of one person being the legitimate child of another may be inferred with tolerable safety, from the behaviour towards them of other members of the family. There are, however, certain important cases, such as proceedings in Divorce, in which the fact of marriage must be substantiated in a more formal manner.

56. We now come to the last class of relevant facts, the cases, namely in which Character is relevant. In civil cases a person's character cannot be proved for the purpose of showing that any conduct attributed to him is probable or improbable. If a man is sued for breaking his promise, or for wrongful detainer of another man's goods, evidence cannot be given to show that he was likely, from his disposition and reputation, to have done that which is alleged against him. It is obvious that inquiries into the ordinary transactions of life would be indefinitely prolonged, if, in deciding whether a man had or had not done something, the Court had always to inquire whether he was the sort of man to do it. We do not know enough about each others motives and dispositions, and we cannot analyze them with sufficient delicacy or minuteness, to allow us safely to draw inferences from them as to the way in which people will manage their affairs: in civil inquiries, accordingly, all evidence of this nature is rejected, though a Judge must, of course, draw his own inferences from the relevant facts proved as to the character of the parties concerned, and such inferences may materially affect the probability of any conduct imputed to them. In criminal inquiries the case is different. There is a broad line between crime and innocence, and when the question is whether a man has committed an offence or not, his character becomes a material consideration. Sometimes it is almost conclusive: suppose, for instance, that a murder is committed under such circumstances that one of two persons must be the murderer: one of them is a habitual offender, of notorious evil life, of ferocious disposition, of lawless habits: the other is a person of refinement, delicacy and saintliness. Who can doubt that in such a case the character of the persons concerned is a main element in the consideration of innocence or guilt? The only question is as to how much evidence of character shall be let in. In the first place, it must be always right that an accused person should have the benefit of a previous good character, and of any favorable inferences that are to be drawn from it. Evidence of good character is accordingly always admissible.

Character when a relevant fact.

As to previous bad character, the anxiety of the Legislature that persons on their trial should be treated with all possible fairness and even indulgence, has excluded evidence of previous bad character except in two cases. If a man has been previously convicted of an offence, that is a tangible

unmistakeable piece of evidence about him, and the Court is to weigh this in determining on the probabilities as to his innocence or guilt. A previous conviction, accordingly, is always a relevant fact, and may be proved as a substantive part of the case for the prosecution, not merely, as heretofore, introduced, at a stage subsequent to conviction for the purpose of entailing a heavier punishment. In the next place, if an accused person brings forward evidence of his previous good character, he has challenged inquiry, and it is obviously right that evidence to contradict his alleged good character, should be admissible: in any such case, therefore, the fact of the accused being of bad character would become relevant.

Character relevant when it affects damages.

57. Lastly, character is relevant in Civil cases, wherever it affects the amount of damages to be recovered, as in actions for libel, seduction, or in proceedings in the Divorce Court. It is obvious that in inquires of this nature, the amount of injury inflicted, and, consequently, the compensation to be given, must depend to a large extent, on the character of the person concerned; and the Court must, accordingly, take notice of this in assessing the damages, to which such person is entitled.

Certain facts admitted for the purpose of corroborating or discrediting witnesses.

58. This completes the list of relevant facts. There are certain other facts, provided for in Sections 146, 148, 155, 156 and 157, which may, under certain circumstances, be proved for the purpose of discrediting a witness either by showing previous inconsistent statements or in some other manner proving him to be untrustworthy; or for corroborating a witness by showing corroborative circumstances or by proof of previous statements consistent with his present evidence. It will be, however, more convenient to consider them in the natural order, when we come to the mode in which witnesses are to be examined.

Part II. How are relevant facts to be proved.

59. This concludes the first part of the Act, as to the material of belief. We now proceed to inquire as to the mode in which this material is to be brought to the Judge's mind,—in other words how facts, which are relevant under the preceding sections, are to be proved. This is provided for in Part II of the Act, (Sec. 56—100).

60. In the first place there are certain facts which need not be proved at all. These are generally facts of so public and notorious a character that everybody is supposed to know them; such as the Law in force in British India, Acts of Parliament, the course of proceeding of Parliament and of the Indian Legislatures, the accession and Sign-manual of the Sovereign, various official seals, the appointment of various officers, and other facts of a like nature. As to these no proof need be offered. The Court takes judicial notice of them, and in doing so, may resort for aid to appropriate books of reference. A party, however, calling upon the Court to take judicial notice of any fact must be ready to supply it with any necessary book for the purpose of reference, (Sec. 57).

Some facts which need not be proved.

Judicial notice.

61. In the next place no proof need be given of facts which the parties or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by writing under their hands, or which, by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings, (Sec. 58).

Facts which the parties agree to admit.

Or are deemed to have admitted by their pleadings

62. This last provision is of less importance in India, than it would be in England, where pleading has been reduced to a rigid, and, until recent times, a highly technical system. According to English law, wherever a material averment, properly put forward by one party is passed over by the adverse party without denial, it is taken to be admitted: and, accordingly, if the plaint states a fact, and the defendant's plea does not contradict it, but goes upon some other ground of defence, (as for instance, that the suit is barred by the Statute of Limitations) this amounts to an admission of the fact by the defendant. No such rule, it need hardly be said, is, in any but a very small degree, applicable to proceedings in an Indian Court, where the Judge, in most instances, frames the issues, as he picks the merits of the story out from the statements of the conflicting parties, and where those parties are generally unlettered peasants without professional assistance. There are, however, no doubt, cases in which a Judge would consider that a man had virtually made an admission by his pleading; as for instance, if a tenant, being sued by his landlord for a

Strict Rules of pleading unknown to Indian Procedure.

breach of the conditions of his lease, pleaded leave and license in the particular instance, the landlord might be considered to be relieved from the necessity of proving the tenancy. So a defendant who, when sued for a bond-debt, pleaded payment, might be taken to have admitted the existence of the bond. No fixed rules, however, on the subject have as yet found a place in the procedure of the Indian Courts.

Rule as to the mode of proof.

63. We then come to the cardinal rules that (1) *All facts, except the contents of documents, may be proved by oral evidence;* and that (2) *Oral evidence must, in every instance, be direct,* that is to say, if the fact to be proved is one that could be seen, the evidence must be that of a witness who saw it; if the fact is one that could be heard, the evidence must be that of a witness who heard it; if it be one which is perceptible by any other sense, the evidence must be that of a witness who perceived it by that sense; if the fact to be established is the existence of an opinion in a persons' mind, the evidence must, except in certain cases in which special provision is made for the proof of Expert's opinions, be that of the person who holds that opinion.

Illustration.

64. Let us suppose, for instance, that A is charged with the murder of B, and that the facts alleged in support of the charge and shown to be relevant under Part I, are as follows;

Relevant Facts.

1st Witness.—A came running from the scene of the murder at 12 o'clock.

2nd Do. Some one screamed out at the same time and place, "A, you are murdering me."

3rd Do. A left his house at 11½, vowing that he would be revenged on B for pressing so hard for his debt.

4th Do. There was blood at the scene of the murder, and on A's hands and clothes.

5th Do. There were tracks of footsteps from the scene of the murder to A's house, which corresponded with A's shoes.

6th Do. The wound of which B died, was of a character to cause death, and could not have been inflicted by himself.

7th Do. The deceased said "The sword blow inflicted by A has killed me."

8th Witness.—The statement of the prisoner before the Magistrate was "I killed B, because I was desperate."

9th Do. The prisoner told me that he was deeply indebted to B.

How the above facts must be proved.

65. Now these various circumstances, statements, and opinions, would all be relevant facts under Part I, and the rule now under consideration provides that in each instance they must be proved by direct evidence, that is, the fact that A came running from the scene of the murder, as alleged, must be proved by a witness who tells the Court that he himself saw A so running; the fact of the screams heard by 2nd witness must be proved by the 2nd witness telling the Court that he did hear such screams; the fact of A having vowed, shortly before the murder, to be revenged on A must be proved by the third witness, who heard the vow: so, the blood by the person who saw it; the footsteps, by the person who tracked and compared them; the doctor's opinion as to the wound by the doctor testifying that that, it is his opinion; the dying man's statement, and the prisoner's confession by a person who heard them. They must not be proved by the evidence of persons to whom any of the witnesses abovementioned may have told what they heard, or saw, or thought.

Specimen of indirect Evidence.

66. For instance, all the following evidence would be inadmissible.

10th Witness.—My child came in and said, "I have seen A running in such a direction."

11th Do. The Police told me that screams had been heard at such a time.

12th. Do. Father said, "I am sure there will be murder, for A has just left the house, vowing to be revenged on B."

13th Do. The Police compared the footsteps and said, "There! they exactly fit."

14th Do. The Doctor said that the man could never cut himself like that.

15th Do. Everybody said that there was no more doubt, for the accused man had identified the prisoner.

16th Do. B's wife told me the day before, that A was heavily indebted to him.

All the evidence of witnesses 10 to 16, would be inadmissible, not because the facts to which it refers are irrelevant, but because it is not direct, that is, not given by the persons who with their own senses perceived the facts described, or in their own minds formed the opinions expressed. The only use that could be made of it would be for the purpose of corroborating some other witness by proving a former consistent statement made by him at the time: or of discrediting him by proving a former inconsistent statement: except for these purposes it would be inadmissible.

Opinions of Experts may be proved by treatises.

67. An exception to the rule that the existence of an opinion must be proved by the person who holds that opinion, is made in favor of Experts, whose opinions may be proved by their published treatises, if the expert is dead or cannot be found, or if the Court considers that to call him as a witness would involve unreasonable delay or expense. Special provisions also are made in the Code of Criminal Procedure for obviating the necessity of the personal attendance of Civil Surgeons and Chemical Examiners to Government, but these provisions in no way infringe the principle in question. The evidence of these officers must be direct, as in every other case: but, on grounds of public convenience, they are allowed to give it in a different way from other people.

Proof of documents.

68. So much for the mode of proving everything except documents: Chapter V, deals with the proof of the contents of documents, and thus brings us to the distinction between primary and secondary evidence.

Primary Evidence.

Primary Evidence of the contents of a document is the document itself produced for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence; and, where a document is executed in counterpart, each part is primary evidence as against the party executing it: where a number of documents are made by a uniform process, such as printing or photography, each one is primary evidence of the contents of all the rest.

Secondary evidence.

69. Secondary evidence includes

(1.) Certified copies given under the provisions of the Act;

(2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3.) Copies made from or compared with the original;

(4.) Counterparts of documents, as against the parties who did not execute them;

(5.) An oral account of the contents of a document given by some person who has himself seen it.

Documents must be proved by primary evidence,

70. The rule on this subject is that *Documents must be proved by primary evidence,* except

Exceptions.

(*a.*) When a document is in the power of the person against whom it is to be proved, or of a person legally bound to produce it, or of a person out of reach of, or not liable to the process of the Court, and such person does not (after notice to produce in cases in which such notice is necessary) produce it;

In this case any secondary evidence of its contents is admissible.

(*b.*) When the existence or contents of the original are proved to have been admitted in writing by the person against whom it is to be proved or his representative;

Here the written admission is admissible.

(*c.*) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason, not arising from his own neglect or default, produce it in reasonable time;

Here any secondary evidence of the contents of the document is admissible.

(*d.*) When the original is of such a nature as not to be easily moveable;

Here again any secondary evidence may be given.

(*e.*) When the original is a Public Document, viz.:

I. A document forming the Act or record of the Act of

Public documents.

1. The Sovereign authority
2. Official bodies and tribunals.
3. Public Officers, Legislative, Judicial and executive, whether in British India, or other portions of Her Majesty's dominions, or a foreign country,

or II. A public record kept in British India of private documents;

In this case the contents of the original may be proved by a certified copy.

(*f.*) When the document is one which may by this Act or any other law in force in British India, be proved by a certified copy;

Here a certified copy is admissible.

(*g.*) When the original consists of numerous accounts or other documents which cannot conveniently be produced, and the fact to be proved is the general result of the whole collection.

Here the result may be proved by any person, skilled in the examination of such documents, who has examined them.

Notice to produce not always necessary.

71. The notice to produce referred to in (*a*) is not, invariably necessary. When the document, the contents of which are to be proved, is itself a notice; when from the nature of the case, the adverse party must know that he will be required to produce it; when the adverse party has obtained possession of the original by fraud or force, or has the original in Court, or has admitted its loss, and when the person in possession of the document is out of reach of or not subject to the process of the Court, no notice to produce is necessary; and the Court may, if it thinks fit in any other case, allow secondary evidence of a document to be given, without the previous notice to produce it.

When handwriting and attestation must be proved.

72. Next follow provisions (Sec. 67—73) as to the proof of hand-writing and signatures, where a document is alleged to have been written or signed by a particular person, and as to proof of attestation when a document is required by law to be attested. As to the latter, the admission of a party to such a document of its

execution by himself is sufficient proof as against him; in other cases one attesting witness must be called to prove execution, or if there be no attesting witness alive, or subject to the process of the Court or capable of giving evidence, or if the document purports to have been executed in the United Kingdom, it will suffice to prove that the attestation of one attesting witness is in his hand-writing, and that the signature of the person executing the document is in his hand-writing. If the attesting witness denies or does not recollect execution, it may be proved by other evidence. In order to prove that a signature, hand-writing or seal, is that of a particular person it may be compared with any signature, hand-writing or seal, proved to the satisfaction of the Court to have been written or made by that person; and the Court may direct any person in Court to write any words or figures for the purpose of comparison. The opinions of Experts and of persons acquainted with the hand-writing are, under Part I, relevant for the purpose of identifying it: in order to prove hand-writing, therefore, some such person should be called.

How certified copies to be procured.

73. We have seen that public documents may be proved by a certified copy. Provision is made in Sec. 76 for securing these certified copies by the enactment that every public officer having custody of a public document, which a person has a right to inspect, shall give that person, on demand and on payment of the legal fees, a copy signed, stated and certified to be correct.

Special ways of proving certain public documents.

74. Beside these certified copies, there are special ways of proving certain public documents which, are pointed out in Sec. 78. Acts, orders or notifications of the Government of India or any Local Government in any Executive Department may be proved by the records of the department, certified by its Head, or by any document purporting to be printed by order of Government: the proceedings of the Legislatures by their Journals, published Acts, or abstracts, or copies purporting to be printed by order of Government: Proclamations, orders or Regulations issued by Her Majesty, the Privy Council or any Department of Government, by copies or extracts contained in the *London Gazette* or purporting to be printed by the Queen's Printer: the Acts of the Executive, or proceedings of the Legislature of a foreign country, by Journals published by their authority or com-

monly received in that country as such, or by a copy certified under the seal of the country or Sovereign, or by a recognition thereof in an Act of the Governor-General in Council: proceedings of a Municipal body in British India, by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body: public documents of any other class in a foreign country, by the original or by a copy certified by the legal keeper thereof, with a certificate, under the seal of a Notary Public or British Consul or Diplomatic Agent, to the effect that the copy is duly certified by its legal keeper.

Presumptions as to documents.

75. One important branch of the proof of documents consists of certain presumptions, which the law authorizes in respect of them. It becomes necessary, accordingly, at this point, to say something of Presumptions generally, though it is only with such presumptions as affect documents that we have at present to deal. The word 'Presumption' has been used in the English Text-books with a very wide signification; on the one hand 'presumptions of fact' or 'natural presumptions' are described as including all those natural inferences which our acquaintance with the physical conditions of the world, the order of things and the constitution of human nature causes us to draw from any given fact: on the other hand 'presumptions of law' or 'artificial' presumptions are defined as meaning certain inferences, which the law directs to be drawn from certain facts, irrespective of the natural inference which those facts suggest: and these, again, are divided into two classes, "rebuttable," when evidence may be given for the purpose of contradicting the inference, and "irrebuttable" or "conclusive" when no such evidence can be given.

Natural and artificial presumptions.

Rebuttable and conclusive Presumptions.

Provisions of the Act as to presumptions.

76. These technical expressions have not been preserved in the present Act, but the subject has been provided for in the following manner. There are, as the law now stands, three classes of inferences which the law directs or empowers a Judge to draw from certain facts in supersession of any other mode of proof. In the first place, the law sometimes directs an inference to be drawn which is indisputable. In this case, on proof of one fact, the Court is directed to regard some other fact as proved, and not to admit proof for the purpose

of contradicting it; in this case the fact, from which the inference is directed to be drawn, is said to be 'conclusive proof' of the fact inferred, (Sec. 3.) For instance the notification of a cession of Territory in the *Gazette of India* is "conclusive proof" that a valid cession, as notified, has taken place: the fact, that a person was born during the continuance of a valid marriage between his mother and any man, is, unless non-access be proved, conclusive proof of his legitimacy; and judgments of certain Courts are, as we have seen, conclusive proof of the facts which they state.

When one thing is "conclusive proof" of another.

Examples.

77. In the next place the inference may be one that the Court is bound to accept as proved until it is disproved; in this case is it said that the Court "*shall* presume;" or, thirdly, the inference may be one, as to which the Court is at liberty either to accept it as proved until it is disproved, or to call for proof of it in the first instance; in this case it is said that the Court "may presume."

Meaning of "shall presume."

Meaning of "may presume."

78. The two latter classes of inferences, which are styled "presumptions," play, as will be seen, a very important part in the proof of documents. Sections 79—85 and Section 89 provide for cases in which the Court *shall* presume certain facts about documents; Sections 86, 87, 88, and 90 provide for cases in which the Court *may* presume certain things about them; in the one case, therefore, the Court is bound to consider the presumption as proved until the contrary is shown; in the other, the Court may, if it pleases, regard the presumption as proved until the contrary is shown, or may call for independent proof in the first instance.

Presumptions as to documents.

79. Thus in the case of every document purporting to be a certificate, certified copy or other document which is declared by law to be admissible as proof of any fact, and which purports to be certified by any Officer in British India or by any authorized officer in any Native State in alliance with Her Majesty, and which is substantially in correct form,

Presumption as to certificate, certified copy, &c.

the Court shall presume,

that the document is genuine, and that the officer who signed or certified it, held at the time the official character which he claims in it, (Sec. 79).

Presumption as to record of judicial evidence.

As to a document, purporting to be a record of judicial evidence or confession or statement of an accused person, made in accordance with law, purporting to be signed by a Judge or other authorized officer,

the Court shall presume

(1) that the document is genuine;

(2) that the statements by the Judge or other officer, as to the circumstances under which, such evidence, statement or confession was taken, are true; and

(3) that such evidence, statement or confession was duly taken, (Section 80).

As to a document purporting to be the *London Gazette*, the *Gazette of India* or of any of the Local Governments, or of any dependency of the British Crown; or to be a Newspaper or Journal, or to be a copy of a Private Act of Parliament printed by the Queen's Printer; or to be a document directed by law to be kept by any person, if it is in due form property custody,

the Court shall presume

that it is genuine, (Section 81).

As to document purporting to be admissible in English or Irish Court without proof of certain matters.

As to a document purporting to be a document, which would by law be admissible in an English or Irish Court, without proof of its seal or stamp or signature or of the official character of the person signing it,

the Court shall presume

that the seal, stamp or signature is genuine, and that the person signing it held the official position which he claims in it; and the document shall be admissible for the same purpose as that for which it would be admissible in England or Ireland, (Section 82).

Presumptions as to Maps, &c.

As to maps or plans purporting to be made by the authority of Government

the Court shall presume that they were so made, and are accurate, (Section 83).

As to books purporting to be printed or published under the authority of the Government of any country and to contain the laws of that country, and as to books purporting to contain reports of decisions of the Courts

the Court shall presume that they are genuine.

Presumption as to powers of Attorney.

As to documents purporting to be powers of Attorney, executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul or representative of Her Majesty or of the Government of India

the Court shall presume that they were so executed and authenticated, (Section 85).

Presumption as to document called for and not produced.

As to a document called for and not produced after notice to produce

the Court shall presume, that it was duly attested, stamped and executed.

Presumption as to certified copy of Judicial record of foreign country.

As to any document purporting to be a certified copy of any judicial record of a country not forming part of Her Majesty's dominions, and certified by a representative of Her Majesty or of the Government of India in the manner customary in such country,

the Court may presume that it is genuine and accurate, (Sec. 86).

Presumption as to books of public interest.

As to any book to which the Court may refer on a matter of public or general interest, and any published chart or map, produced for its inspection,

the Court may presume

that it was written and published by the person, and at the time and place by whom or at which it purports to have been written and published.

Presumption as to Telegraphic Messages.

As to a message forwarded from a Telegraph office, the Court may presume that it corresponds with the message delivered for transmission at the office from which it purports to be sent.

Presumptions as to documents thirty years old produced from proper custody.

As to a document, proved or purporting to be thirty years old, and produced from proper custody,

the Court may presume that the signature and every other part is in the hand-writing of the person, by whom it purports to be written, and that it was duly executed and attested by the persons by whom it purports to be executed and attested.

80. This concludes the provisions of the Law for the proof of documents. Before we quit the subject of documents, however, there is a subject of the utmost difficulty and importance to be disposed of, *viz.*, the cases in which the existence of a document operates to exclude any other evidence as to the matter to which the document refers.

Exclusion of oral by documentary evidence.

81. As to this there are two cardinal rules.

First, that (*a*) when the terms of a contract, grant, or other disposition of property have been reduced to the form of a document, or (*b*) whenever any matter is required by law to be in the form of a document, no evidence shall be given of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself or Secondary Evidence of its contents in cases in which Secondary Evidence would be admissible,

Exclusion of oral evidence by documentary in certain cases.

Secondly, that when the terms of a contract, grant or other disposition of property, or a matter required by law to be in the form of a document, have been proved by the production of the document, no evidence of any oral agreement or statement shall be admitted, as between the parties to the instrument or their representatives, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

82. Both these rules, however, are subject to important exceptions. As to the first it is provided that a public officer, whose appointment must by law be in writing, may, nevertheless, be proved to be such officer by the fact of his having acted as such, without the production of the writing by which he was appointed. In the next place Wills admitted to Probate in British India may be proved by the probate. It is explained too that the mention in a document of matters other than the terms of a contract, grant or disposition of property, or which are not required by law to be in writing, does not preclude proof of them by any other means. For instance, the fact of a receipt for money paid having been given does not prevent the payment being proved in any other way.

Exceptions.

83. The provisos to the second of the above rules go far to modify its effects; and their operation forms one of the most subtle

Cases in which oral evidence is admissible notwithstanding the

existence of a document.

and difficult branches of the Law of Evidence: They are the following:—

(1) In the first place any fact which would invalidate a document, or which would entitle any person to a decree or order in respect of it, may be proved. Thus a man may show, that a written agreement was for an illegal purpose, was obtained by fraud, or was without consideration, or was executed by him during minority, or under a mistake in law or fact. (2) A separate oral agreement as to a matter on which the document is silent and which is not inconsistent with its terms, may be proved; and so may (3) a separate oral agreement constituting a condition precedent to the attaching of any obligation under the document; (4) a subsequent oral agreement to modify or reverse the original contract, except when it is obliged by law to be in writing, or has been duly registered; (5) an usage or custom annexing incidents to the contract, not expressly mentioned in it, but not inconsistent with its express terms, or (6) any fact which shows in what manner the language of the document is related to existing facts.

In the application of this rule, it should be observed that it applies only as between the parties to a document or their representatives; other persons than these may give evidence of a contemporaneous oral agreement varying the terms of the document.

Employment of oral evidence in the interpretation of documents.

84. This introduces the difficult question of the extent to which extraneous evidence may be given to aid in the interpretation of documents. This is dealt with in Sections 93—100. The rules may be stated generally as follows:

(1.) When language is, on the face of it, ambiguous or defective, its defects cannot be remedied by evidence. Where, for instance, there are blanks in a deed, or where the idea conveyed by its language is an ambiguous one, such as when the oracle answered Pyrrhus in terms which meant equally well either that he could conquer the Romans, or that the Romans could conquer him; in such cases extraneous evidence cannot be given to show what the meaning was.

(2.) When language is plain in itself and applies accurately to existing facts, evidence cannot be given to show that it was intended to apply to other facts.

(3.) When language is plain in itself but unmeaning in reference to existing facts, evidence may be given to show its meaning.

(4.) Where language would apply equally well to several persons or things, but could not have been intended to apply to more than one, evidence may be given to show to which of such persons or things it was intended to apply.

(5.) Where language applies partly to one set of facts and partly to another, but the whole of it does not apply accurately to either, evidence may be given to show to which it was intended to apply.

(6.) Where a document contains illegible or unintelligible characters, foreign, obsolete, technical or provincial terms, or abbreviations or words used in a peculiar sense, evidence may be given to explain them.

The above rules of interpretation do not apply to documents which are governed by the Indian Succession Act: Chapter XI of that enactment makes express provision for the interpretation of Wills, and the two subjects are, accordingly, kept apart.

85. This brings us to the conclusion of the 2nd part of the Act. We have seen in Part I of what the material of belief must consist; in Part II, the mode in which that material must be brought to the Judge's mind, viz., by oral or documentary evidence, according to the circumstances of the case; we have now in Part III, certain directions as to the mode in which witnesses are to be examined, and as to the principles according to which the burthen of proof is thrown on one party or the other.

Part III. Production and effect of evidence.

With regard to this latter point, the first and obvious principle is that the burthen of proving the existence or non-existence of any fact lies on the party who wants the Court to believe such existence or non-existence. If A sues B on a Bond, and B denies its execution, the burthen of proving the execution of the Bond lies on A and, till he has proved that, he has not made out a *primâ facie* case. Supposing, however, that B admits the execution of the Bond, but pleads that it was obtained by fraud or executed during minority, the burthen of proving these assertions is now on him, as, since his admission of the execution of the deed, the *primâ facie* case

The burthen of proof.

is in favor of the plaintiff; unless, therefore, the defendant makes out his plea of fraud or minority, the decision must be against him. It will thus be apparent that the burthen of proof may be shifted during the proceedings according to the facts proved by the witnesses or admitted by the parties. The burthen of proof will, in the first instance, as a general rule, be on the plaintiff as being the party who wants to put the law in motion; but facts may be proved or admitted, which will have the effect of shifting the burthen to the defendant and will entitle the plaintiff to Judgment in his favor unless they are disproved.

How the burthen of proof is shifted.

86. This shifting of the burthen of proof is in a large number of instances the result of presumptions. It is obvious that, when a presumption is raised, the burthen of disproving the fact presumed is thrown upon the party who denies it. For instance, a man is charged with having received stolen property knowing it to be stolen; the burthen of proof lies in the first instance on his accusers: but if he is shown to be in possession of the stolen property shortly after the theft, and to be unable to account for his possession of it, a Judge may presume his guilty knowledge, and, if he does so, the result will be to shift to the accused person the burthen of disproving guilty knowledge, and, in default of his succeeding in disproving it, to render him liable to be convicted of the offence: or, again, a man is sued on a Bill of Exchange, if the acceptance is proved or admitted, the Judge may presume that there was good consideration for it; thereupon the burthen of proving that there was no consideration will lie upon the defendant, and in default of his making this out, Judgment will go against him. Wherever, accordingly, it is provided in the Act that the Court may presume a thing, the Judge has the power of throwing the burthen of proof on whichever party he pleases: wherever it is provided that the Court shall presume a thing, the burthen of disproving it is thrown, irrespectively of the Judge's opinion, on the party who denies it: wherever, again, it is provided that the burthen of proving a thing is to lie on any particular person, this is tantamount to a provision that the Court shall presume against the existence of that thing, until the person in question has proved its existence.

Effect of presumptions in shifting the burthen of proof.

Rules as to the party on whom the burthen of proof is to lie.

87. In the following instances special provision is made as to the party on whom the burthen of proof shall lie;

I. When it is necessary, in order to render particular evidence admissible, that some fact should be proved, the burthen of proving that fact lies on the person who wants to use the evidence: *e. g.*, if A wants to prove a dying declaration of B, he must prove that B is dead: if he wants to use Secondary Evidence of a document, he must prove that the original is destroyed or lost.

II. When a person is accused of an offence, the burthen of proving that his case falls within any general or special exception or proviso of the Indian Penal Code or other law, lies on the accused, (Section 105).

III. When a fact is specially within the knowledge of any person, the burthen of proving it lies on him, (Section 106).

IV. If a man is shown to have been alive within thirty years, the burthen of proving him to be dead lies on the person affirming it, (Section 107).

V. If a man has not been heard of for seven years, the burthen of proving him to be alive lies on the person asserting it, (Section 108).

VI. When people are shown to have stood in the relation of partners, landlord and tenant, or principal and agent, the burthen of proving that such relationship has ceased lies on the person asserting it, (Section 109).

VII. When a person is in possession of anything, the burthen of proving him not to be the owner lies on the person asserting that he is not the owner, (Section 110).

VIII. When a person stands in a position of active confidence, such as trustee, towards another, the burthen of proving the good faith of any transaction between them lies on the person in the position of active confidence, (Section 111).

Cases in which the Court may presume.

88. In all the above cases, as the law directs on whom the burthen of proof is to lie, no option is given to the Judge as to whether he will presume the fact or no: he is bound in every instance to presume against the party on whom the burthen of proof is directed to lie: but there are numerous instances in which no such restriction is imposed, and where the Judge, accordingly, can throw the burthen of proof on

whichever side he chooses, by presuming the fact, or by calling for proof of it in the first instance. These are the "natural presumptions" to which reference has been already made, as being not the technical creations of law, but the natural result of our experience of the world. They are in fact inferences which the mind would draw of its own accord; and all that the law does for them is to authorize their being so drawn, in cases where the Judge thinks well to do so.

Facts which may be presumed.

89. Cases of this nature are dealt with in Section 114, which provides that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the case;" in other words, wherever the ordinary course of human events and the general tendency of human character render it probable, under the circumstances of the case, that a thing is true, the Court is at liberty to presume its truth, to exempt the party asserting it from the necessity of proof in the first instance, and to throw upon the party who denies it the burthen of showing that is not true. Whether in any particular case it is safe so to do, is a question which the Judge must decide for himself according to his judgment. This is made clear by the Illustrations. Thus it is in the ordinary course of things that a Bill of Exchange should be accepted for good consideration. A Judge may therefore, and naturally will, as a general rule, presume that it was so accepted, and will throw upon the person, who denies that good consideration was given, the burthen of proving it. But a Bill may be brought into Court under circumstances, which would render it dangerous to apply the general presumption; suppose, for instance that A, the drawer of a Bill, is a man of business, and B, the acceptor is a young and ignorant person, completely under A's influence. Here the ordinary presumption that Bills of Exchange are given for good consideration is countervailed by the presumption that in this case B was over-reached by A, and the Court might reasonably throw upon A the burthen of proving that consideration did, as a fact, pass.

Illustrations.

90. Various other instances of the same rule are given in the Illustrations to Sec. 114. It is, for example, likely in the natural course of things that a man who is found in possession of stolen goods, shortly after the theft, and who cannot account for their

possession, has either stolen them or received them with a guilty knowledge: the Court may, therefore, presume this to be so, if it thinks well: but cases may arise in which such a presumption would be most unfair: a marked rupee is traced to a shopkeeper's till: he can give no specific account as to how it got there, yet it does not even raise a suspicion against him. So, again, the Court may presume, as being in accordance with the common course of things, that an accomplice is unworthy of credit: but there are cases in which, from the character of the parties and of the offence charged, the most implicit reliance may be placed in what an accomplice says. So again the Court may presume that evidence which might be, and is not produced, would be unfavourable to the party not producing it: but it might well be that special circumstances, as, for instance, family considerations, would prevent a party from calling a witness whose evidence would be in the highest degree favorable to his cause; and it would be, therefore, unfair to make the usual presumption. Such presumptions ought not, therefore, to be obligatory. In all these, and similar cases, the Judge *may* presume; it is for him to decide whether or not he ought to do so.

Conclusive proof as to legitimacy.

91. We have next in Sections 112 and 113 two instances of conclusive proof. The fact of a person being born during a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, is conclusive proof of his legitimacy, unless non-access be proved, (Section 112); and a notification in the *Gazette of India* of a cession of British Territory to a native Ruler, is conclusive proof of such cession and of its validity, (Section 113); other instances of conclusive proof are afforded by those Judgments of Probate, Matrimonial, Admiralty or Insolvency Courts, which, as we have seen, are conclusive proof of any legal character or of any absolute right conferred or declared by them to exist. In all such cases further proof is, of course, superfluous, and all contradictory evidence inadmissible.

Conclusive proof of cession of Territory.

English law of Estoppel.

92. The subject of "Estoppel" is next dealt with. Under the English Law a man may be estopped by the language of an instrument to which he is a party, or of a record of legal proceedings, in which he was concerned, or by his own conduct in some transaction, from setting up, as against any person who was

a party to that instrument or those proceedings, or who was affected by that conduct, a contrary state of things. Questions of great nicety and difficulty have arisen in the Courts as to the extent to which these estoppels operate, and as to the statements and persons that fall within their scope. The tendency of modern opinion has been, however, unfavorable to the utility of estoppels, and the present law retains them only in cases which fall under the last of the three classes just mentioned, those, namely, in which a man is estopped by his own previous behaviour. The following are the only estoppels, which will, for the future, be known to the Indian law.

Estoppel by declaration or conduct.

I. When a person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act on such belief, neither he nor his representative can, in a proceeding between himself and such person or his representative, deny the truth of that thing.

Estoppel of tenant.

II. A tenant of immoveable property cannot, during the continuance of the tenancy, deny that the landlord had, at the commencement of the tenancy, a good title to the property leased; nor can a person, who came upon immoveable property by the license of the person in possession thereof, deny such other person's title at the time when such license was given.

Estoppel of acceptor of Bill of Exchange, of bailee, & licensee.

III. An acceptor of a Bill of Exchange cannot deny that the drawer had authority to draw or endorse it; nor can a bailee or licensee deny that his bailor or licensor had, when the bailment or license commenced, authority to make it. This is, however, subject to the important exception that a bailee may, if he has delivered the bailed goods to a person other than the bailor and is sued by the bailor in respect of such delivery, plead that such other person has a right to them as against the bailor.

Except the above no estoppels.

93. These are the only cases in which a man is precluded by law from setting up what facts he pleases. Unless a case can be brought within these sections, the mere fact that a state-

ment is contained in a deed, to which some person is a party, will not disable him from endeavouring to prove the contrary, though it may, of course, be evidence of an admission on his part, and so render it difficult for him to do so. In like manner, the mere fact that a statement is contained in a judgment, to which some person is a party, will not estop him from setting up the contrary. The Judgment may bar an action by showing that the same cause of action has been already disposed of; or it may be conclusive proof of some fact under Section 41 of the Act, in which case, of course, no contradictory evidence can be given; or again, it may show that a person has brought himself within the scope of some of these sections as to estoppel, and is so precluded from denying the truth of some fact: but unless this is the case, he will be at liberty to prove any fact, notwithstanding that a Judgment, to which he was a party, contains a statement about it to a contrary effect.

94. We now proceed to the consideration of the rules governing the examination of witnesses. All persons, we have already seen, are competent to testify, unless the Court considers that by reason of tender years, extreme old age, disease or infirmity, they are incapable of understanding the questions put to them and of giving rational answers. The last remnant of the system of excluding witnesses, which still lingered in the law of the High Courts, is swept away by the provision that husbands and wives shall be in all civil and criminal cases competent witnesses against one another.

Rules as to the examination of witnesses.

95. There are various cases, however, in which witnesses are exonerated or disabled from answering as to particular matters. In the first place no Judge or Magistrate can, except on the special order of some Court to which he is subordinate, be compelled to answer any question as to his own conduct in Court as such Judge or Magistrate; though he may be examined as to other matters, which occurred in Court while he was so acting. No person again can be compelled to disclose any communications made to him or her during marriage by any person to whom he or she is or has been married; nor may such communications be disclosed, unless by consent of the other party, except in suits between married persons, or prosecutions in which one married person is accused of an offence against another.

Judges and Magistrates not compellable to answer certain questions.

Communications during marriage.

96. No person, again, can give evidence derived from unpublished official records, except with the permission of the department concerned; nor can a public officer be compelled to disclose communications made to him in official confidence; nor a Magistrate or Police Officer to speak to the sources of his information as to the commission of any offence.

Affairs of State and official communications.

97. The next class of excluded evidence are professional communications made by or on behalf of a client to his barrister, pleader, attorney or vakeel. No such person may, without the client's express consent, disclose any such communication, when it is made in the course and for the purpose of his employment; nor may he state the contents or condition of any document, with which he became acquainted in the course and for the purpose of such employment, or disclose any advice given by him to his client. The protection, however, in this case does not extend to (1) communications made in furtherance of any criminal purpose, nor to

Legal advisers not to disclose professional communications.

(2) any fact, observed by a Barrister, Attorney, Pleader or Vakeel in the course of his employment, showing that a crime or fraud has been committed since the commencement of his emyloyment. A Solicitor therefore, who, during his employ, observed that his client had been tampering fraudulently with his own books, would not be exempted from disclosing the fact.

98. An important modification in the existing law has been effected by the provision in Sec. 128, that a party to a suit who gives evidence at his own instance is not to be deemed thereby to have consented to a disclosure by his legal adviser of professional communications; and that if he call his legal adviser as a witness, he does not consent to his disclosing professional communications, unless he questions him on matters which, but for such question, he would not be at liberty to disclose. As the law previously stood, if a party to a suit gave evidence therein at his own instance, he waived his privilege and was liable to have his communications with his legal adviser disclosed. As it may often be essential for the purpose of a suit that a party to it should give evidence in it at his own instance, the hardship of entailing such a consequence upon the

Client does not waive his privilege by giving evidence.

giving of such evidence was, of course, extreme; and the present enactment appears to provide for the subject in a fairer and more reasonable manner.

Client need not disclose confidential communication with his legal adviser.

99. On the same principle no one can be obliged to disclose confidential communications between himself and his professional adviser, unless he offers himself as a witness: in that case he can be compelled to disclose any such communications as the Court thinks necessary to explain his evidence, but no others.

Witness need not produce title Deeds.

100. Nor again, can any witness, who is not a party to the suit, be compelled to produce his title deeds or any document which might tend to criminate him, unless he has agreed in writing to produce them: nor can he be compelled to produce deeds in his possession, belonging to another person, which that person, if they were in his possession, might refuse to produce; unless, of course, the person cencerned consents to their being so produced.

Witness must answer criminating questions.

101. On the other hand a witness cannot refuse to answer a question as to a fact, relevant or in issue, simply on the ground that the answer will tend to criminate him, or expose him to penalty or forfeiture. No such answer, however, can expose the witness to arrest or prosecution, nor can it be made use of in any criminal proceeding against him, except in case of a prosecution for giving false evidence.

Evidence of accomplice.

102. The question of the sufficiency of the uncorroborated evidence of an accomplice to support a conviction has been frequently discussed in the Courts: all doubt on the subject is now removed by the provision in Sec. 133, that a conviction is not illegal merely because it is grounded on the uncorroborated evidence of an accomplice. Another dubious point is cleared up by the enactment in Sec. 134 that no particular number of witnesses are required for proof of any fact.

Mode in which witnesses are to be examined.

103. We come next to the mode in which witnesses shall be examined. The Judge is to allow only such evidence to be given as is, in his opinion, relevant; when the relevancy of a fact depends on proof of some other fact, the Judge may either insist on that other fact being proved first, or may accept the party's undertaking that it shall be

proved at a subsequent stage. Thus if it is proposed to prove one of the statements which are relevant only if the person who made them is dead, the Court may insist on having that person's death proved before admitting the statement, or may admit the statement first on an undertaking that the death shall be subsequently proved.

Examination, Cross-examination and Re-examination to what topics confined.

104. The examination of the witness by the party who calls him is termed his "examination-in-chief;" this is followed by his "cross-examination" by the adverse party, and this again by his "re-examination" by the party who called him. Both examination and cross-examination must relate to relevant facts, but the cross-examination may relate to relevant facts other than those with which the examination-in-chief was concerned. The re-examination must, except with the permission of the Court, be directed to the explanation of matters referred to in cross-examination; and if the Court allows new matter to be introduced in re-examination, the opposite party has a right to cross-examine on the matter so introduced. A person does not, however, become a witness by the mere fact of producing a document in obedience to a summons, and unless he is called as a witness he cannot be cross-examined: but witnesses to character may be cross-examined and re-examined in the same manner as any other witness.

When leading questions may be asked.

105. The important distinction between the examination and cross-examination is that in examination and re-examination leading questions, that is, questions which suggest the answer which the questioner wishes or expects to receive, must not be asked, except with the permission of the Court: while in cross-examination leading questions may be asked. The Court, however, is to permit leading questions in examination or re-examination, as to matters which are introductory or undisputed, or which have in the opinion of the Court been already sufficiently proved.

Witness about to give oral evidence of a document in existence may be stopped.

106. We next have a rule for the purpose of carrying out the provisions of Section 91, as to the exclusion of oral by documentary evidence; this is that any witness, who is about to give evidence as to a contract, grant or other disposition of property, may be asked whether it was not in writing, and if he says that it was, he may be stopped, and the production of the document

enforced, or the right to give Secondary Evidence made out. This rule is extended to any document which, in the opinion of the Court ought to be produced. Care must, however, be taken not to apply it to cases in which oral evidence is given of statements of other people about the contents of documents, when those statements are relevant. Supposing, for instance, that the question was whether A had murdered B. A witness might prove that A had said "B's bond is iniquitous, I will kill him sooner than pay it," without the bond being produced; the reason obviously being that what the witness wants to prove is not the contents of the document, but *A's feeling about the contents of the document*, as supplying a motive for his crime.

Previous Statements.

107. A witness, also, may be asked about previous statements made by him and reduced into writing without such writing being proved: before, however, the writing can be proved for the purpose of contradicting the witness, his attention must be drawn to such parts of it as are to be used for the purpose of contradicting him.

Questions as to character.

108. This brings us to the class of questions which are asked, not for the purpose of proving or disproving relevant matter, but for the purpose of testing, impugning or confirming the veracity of a witness. Such questions in India especially are of material importance in guiding the Judge's mind in his view of the case. For this purpose it is provided that a witness may be asked any question which tends (1) to test his veracity,

(2) to discover who he is and what is his position in life,

(3) to shake his credit by injuring his character. It is no objection to the asking of such questions that the answer to such questions might tend to criminate the witness or expose him to penalty or forfeiture. It is necessary, however, to make careful provision against so powerful an engine being oppressively or wantonly employed. It would be a grievous hardship if every person, who came forward to give evidence, was liable, at the caprice of an unscrupulous cross-examiner, to have every detail of his life dragged into the light, and to be forced to reply to interrogations, which suggest what the interrogator dares not assert, and thus are merely slanders in disguise. To the Judge, accordingly, is confided the delicate and responsible task of admitting or excluding questions asked

with the view of testing or injuring the witness' character. When a question is asked merely for this purpose the Court is to decide whether the witness is to be compelled or not to answer it. In deciding whether such a question is proper or not, the Court is to consider, firstly, whether the imputation conveyed by it is such as seriously to affect the Court's opinion as to the witness' veracity, or whether, from remoteness of time or from its character, it would affect it only in a very slight degree; and, secondly, whether there is a great disproportion between the importance of the imputation conveyed and the importance of the evidence given. If the evidence is very unimportant, and the imputation on the witness' character very serious, the question ought not to be asked. A witness for instance, who proves the posting of a letter or the entry of some unimportant item, ought not to be asked questions, the answers to which might blast his reputation. With a view to such considerations as these, it is further provided that the Court *may* infer from the witness' refusal to answer that the answer, if given, would be unfavorable to him, but that it is not bound to do so.

In no case ought such a question to be asked, unless the person asking it has some reasonable grounds for supposing the imputation, which it conveys, to be true. Barristers, Attorneys and other professional persons offending against this rule are liable to be reported to the High Court or other authority to which they are subordinate.

Indecent or scandalous questions.

109. The Court has also the power of forbidding questions which it regards as indecent or scandalous, unless they relate to facts in issue or are indispensable to the proof or disproof of facts in issue. Questions also that appear to be intended to insult or annoy, or which are couched in a needlessly offensive form, may be forbidden.

Answers to questions as to character cannot be contradicted.

110. It is obvious that questions asked merely to discredit a witness introduce matter altogether foreign to the inquiry, and that, if controversy about the matter so introduced were allowed, the Court would be occupied with deciding not the merits of the case but the merits of the witnesses, and that thus any suit might be indefinitely protracted. It is, therefore, provided that, whenever a witness has answered a question asked merely for the purpose of discrediting him, no evidence shall be given in the case to contradict his answer: the only remedy, if he answers falsely,

is to prosecute him afterwards for giving false evidence. To this rule, however, there are two exceptions, allowed perhaps, because they are matters which admit of clear and easy proof. If a witness is asked whether he has been previously convicted and denies it, the previous conviction may be proved: and if he is asked about and denies any fact tending to impeach his impartiality, as "are you not the plaintiff's brother"? or "have you not received a bribe from the defendant," the fact impeaching his impartiality may be proved.

Evidence to discredit a witness.

111. Besides being asked questions tending to discredit, a witness may be discredited by the evidence of other persons to the effect that (1) they from their knowledge of the witness believe him to be unworthy of credit, (2) that the witness has been bribed or has accepted the offer of a bribe, (3) that he has on former occasions made statements inconsistent with his present evidence, and (4), in prosecutions for rape or attempts to rape in which the prosecutrix is a witness, that she was of generally immoral character. Any of the above facts may be proved by the party cross-examining a witness, and, with the consent of the Court, by the party who calls him.

Restrictions to which such evidence is subject.

112. Here, again, precautions are taken to prevent the Court going into irrelevant controversy by the following rule: Where a witness states that he believes another to be unworthy of credit, he may not, in his examination-in-chief, be asked his reasons for so believing: but in cross-examination he may be asked for his reasons, and his answers to such questions cannot be contradicted, though, of course, they may render him subsequently liable to a prosecution for giving false evidence. It is clear that but for some such rule there might be a pitched battle fought over the character of every witness, and that suits would be simply interminable.

Corroboration.

113. Next, follow provisions for corroborating a witness by asking him about circumstances, other than those to which he speaks, which he observed about the same time or place. Another mode of corroboration is by proving a former statement to the same effect as the witness' present evidence, made by the witness (1) either at or about the time when the fact, to which he speaks, took place, or (2) before any competent legal authority.

Relevant statements may be corroborated or contradicted.

114. There are, as we have seen, some cases in which, under the provisions of this Act, a person's statement becomes relevant.* Wherever this is the case, it is obviously right that the statement should, as far as possible, be submitted to every test to which oral testimony is submitted. It is provided, accordingly, in Section 158 that in every case in which, under Section thirty-two or thirty-three of the Act, a statement is made relevant, the statement may be corroborated or contradicted, or the credit of the person, who made it, may be impeached or confirmed by any evidence which would have been admissible against that person, had he been called in cross-examination. Take for instance the case of an entry in a deceased trader's books: any former entry or statement, corroborative or contradictory, or any fact, tending to show that the person making it was untrustworthy or partial, which might have been proved if he had been cross-examined, may be proved for the purpose of increasing or diminishing the importance to be attached to the entry.

Refreshing memory.

115. Sometimes a witness needs to refresh his memory as to the facts about which he speaks. This he may do by referring to any writing made by himself at the time of the transaction to which it refers, or so soon after as that his memory was still fresh; or even to a document made by another person and read by the witness, and known by him to be correct while his memory was still fresh. A witness may also, for the purpose of refreshing his memory, refer to a copy of any document, to which he might refer, if it were produced, provided that good cause for the non-production of the original be shown. He may also testify to facts stated in any document, to which he might refer to refresh his memory, though he has no specific recollection of them, if he is sure that they were correctly recorded. Any paper used to refresh the memory must be produced and shown to the opposite party, who may, if he pleases, cross-examine upon it.

Witness summoned to produce document must bring it to Court.

116. It sometimes occurs that a witness is summoned to produce a document, which he has a right to refuse to produce, or which would, if produced, be inadmissible as evidence. In this case he must, notwithstanding any objection that there may be to its production or admissi-

* See *ante*, paras. 42 and 43.

bility, bring it to Court, and the Court will decide as to whether he is bound to produce it, and as to whether it is admissible. In order to decide on its admissibility the Court may, unless it be a document of State, inspect it, or take evidence about it.

Document called for and inspected must be given in evidence if required.

117. We have seen* that previous notice to produce a document is in some cases necessary in order to make Secondary Evidence of its contents admissible in case of its non-production. This notice to produce may affect the position of the party giving it. If he gives notice to produce, and at the trial calls for the document and inspects it, he is bound to put it in as evidence if the other party requires it. The law will not allow him to compel its production, and see its contents, and then make use of it or not, according as it strengthens or impairs his cause.

Person refusing to produce a document cannot afterwards put it in as evidence.

Another provision, grounded on the same principle of fair play, is that a person refusing to produce a document, which he had notice to produce, cannot afterwards, except with consent of the opposite party or by order of the Court, himself use it as evidence.

Judge's power to ask questions.

118. We come next to the Judge's power to ask questions. It frequently happens that the parties do not, in their questions, elicit all the facts necessary to a sound view of the merits of the case. A plaintiff may have some weak point in his case which he is afraid of betraying and so dexterously avoids, or a defendant may fail to perceive the import of some answer given and allow it to pass uncriticized: in any such case it is highly important that the Judge should be armed with full power enabling him to get at the facts. He may accordingly, subject to conditions to be immediately noticed, ask any question he pleases, in any form, at any stage of the proceedings, about any matter relevant or irrelevant, and he may order the production of any document or thing. No objection can be taken to any such question or order, nor are the parties entitled, without the Court's permission, to cross-examine on the answers given. This general power,

Restrictions on Judge's power to ask questions.

however, is very closely restricted. In the first place, the Judgment must be based on relevant facts, and those relevant facts must have been duly proved: next, the Judge cannot compel

* See *ante*, paras. 70 and 71.

a witness to answer any question, or to produce any document which he would be entitled to refuse to answer or produce, at the instance of the opposite party; nor may the Judge ask any of the questions as to credit which would be improper if asked by the adverse party; nor can he dispense with primary evidence of a document unless the facts of the case show that Secondary Evidence is admissible.

A Judge, accordingly, cannot, by the exercise of the powers conferred by this section, import into the decision of the case any fact which is not relevant under the Act, nor can he in any case dispense with the prescribed mode of proof, or ask questions to credit, except such as would be permitted if asked by the parties. Thus restricted, the power of asking questions, is of obvious utility in a country like India, where, in the vast majority of cases, no advocate is employed but the Judge has to make out the truth as best he can from the confused, inaccurate and often intentionally false accounts of ignorant, excited and mendacious peasants.

Improper admission or exclusion of evidence.

119. The Act concludes with repeating the provision of Act II of 1855 to the effect that the improper admission or rejection of evidence is not ground for a reversal of the Judgment or for a new Trial of the case, if the Court considers that, independently of the evidence improperly admitted, there was evidence enough to justify the decision, or that, if the rejected evidence had been admitted, it ought not to have varied the decision. When, therefore, an appeal is grounded on the improper exclusion or admission of evidence, the appellant must be prepared to show, not only that there has been an improper admission or exclusion, but that a miscarriage of justice has been thereby occasioned.

THE

INDIAN EVIDENCE ACT,

No. I OF 1872.

Recevied the assent of His Excellency the Governor-General on the 15TH MARCH 1872.

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows :—

Preamble.

PART I.

RELEVANCY OF FACTS.

CHAPTER I.—PRELIMINARY.

Short title.

1. This Act may be called "The Indian Evidence Act, 1872 :"

Extent.

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts Martial, but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator ;

Commencement of Act.

and it shall come into force on the first day of September 1872.

[Evidence is one of those matters which are governed by the law of the country in which the proceeding takes place, and not by that of the country where the contract sued upon was made, or the cause of action arose. Thus a statement or a document might be inadmissible in a Court in British India, though it would be admissible in a French Court, notwithstanding that the contract sued on was made in France, and the parties were Frenchmen : and *vice versâ*.

This principle of law was thus laid down by Lord Brougham ; "The law of evidence is the *lex fori* which governs the Courts : whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, these and the like questions must be determined, not *lege loci contractûs*, but by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it."—*Bain* v. *the Proprietors of the Whitehaven Railway Company and Forbes*, 3 H. L. C., 1.]

Repeal of enactments.

2. On and from that day the following laws shall be repealed :—

(1.) All rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India :[1]

(2.) All such rules, laws and regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Councils' Act, 1861,' in so far as they relate to any matter herein provided for ;[2] and

(3.) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to effect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

[(1.) This has the effect of repealing the whole of the English Common Law on the subject of evidence so far as it was in force in British India. The decisions of the English Courts on points of evidence are accordingly for the future of no binding effect in Indian Courts, and can be referred to only for the purpose of explaining or illustrating the meaning of the present Act.

The Hindu and Mahummadan Laws abound in rules of evidence, as *e. g.*, as to the number of witnesses requisite to prove particular matters, the exclusion of certain witnesses, and the presumption to be raised in certain cases. These rules do not appear to have been among those portions of the existing law of the country which the British Power retained in force on assuming the administration of Government. At any rate since the commencement of the present century the Courts have not considered themselves in any way bound by them. All doubt on the subject is now removed.

(2.) Clause (2) refers to various rules as to evidence issued by the Government in "Non-Regulation" Provinces previous to the Indian Councils' Act, 1861, and which became law under that enact-

ment. In the Punjab, for instance, there was in force till recently a special rule as to the production of a day-book and ledger for proof of book-debts. Other provisions of a like nature are believed to have been in force in Oudh, the Central Provinces and elsewhere.]

Interpretation-clause.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

"Court."

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.[1]

"Fact."

"Fact" means and includes—

(1) anything, state of things, or relation of things, capable of being perceived by the senses ;[2]

(2) any mental condition of which any person is conscious.

Illustrations.

(a.) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b.) That a man heard or saw something is a fact.

(c.) That a man said certain words is a fact.

(d.) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e.) That a man has a certain reputation is a fact.

'Relevant.'

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue."

The expression "Facts in issue"[3] means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil

Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations.

A is accused of the murder of B.

At his trial the following facts may be in issue :—

That A caused B's death ;

That A intended to cause B's death ;

That A had received grave and sudden provocation from B ;

That A, at the time of doing the act which caused B's death, was by reason of unsoundness of mind, incapable of knowing its nature.

"Document." "Document" means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations.

A writing is a document.

Words printed, lithographed or photographed are documents.

A map or plan is a document.

An inscription on a metal plate or stone is a document.

A caricature is a document.

"Evidence." "Evidence" means and includes—[4]

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry ;

such statements are called oral evidence :

(2) all documents produced for the inspection of the Court ;

such documents are called documentary evidence.

"Proved." A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.[5]

"Disproved." A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved." A fact is said not to be proved when it is neither proved nor disproved.

[(1.) The provisions of the Act, therefore, will apply to Commissions to take evidence under Civil Procedure Code, Sections 175—181, or under Code of Criminal Procedure, Section 330, but not to examinations of witnesses by the Police, Section 119.

(2.) "Fact" is often understood as denoting some event which occurred or something which was done as opposed to something said, or some opinion or feeling of mind or body. This is not the sense in which it is used in the Act; statements, feelings, opinions and states of mind are just as much "facts" as any other circumstance of which, through the medium of the senses or by our own self-consciousness, we become aware, and all, if they comply with the requirements of the Act as to relevancy, are equally admissible for the purpose of proving or disproving the matter to which they relate.

"Capable of being perceived by the senses" means "of such a nature as that, if it were submitted to the operation of some sense, a perception would result." Many things are "facts," although, under existing circumstances, they are not perceptible by any sense nor suggested to us by our self-consciousness. The existence of a man's brain, for instance, is a fact, because, though, while he is alive, it cannot be perceived, yet it may, after his death, be seen and felt and otherwise perceived. The existence of a star, beyond the reach of the best telescope, is a fact because, though not perceptible to our senses as matters now stand, it is *capable* of being perceived, supposing that it were nearer to us, or that our means of telescopic observation were greater.

(3.) For the various ways into which one fact may be so related to another as to be relevant to it, see Chapter II, Sections 5—55.

A fact "in issue" is a fact out of which some legal right, liability or disability, involved in the inquiry, arises, and upon which, accordingly, a decision must be arrived at. Supposing the inquiry to be whether A is entitled to succeed to B's property as his son, the fact of A being B's son, the facts of B's death and the existence of B's property, would then be facts in issue because out of them arises directly A's right of succession. Supposing the inquiry to be whether A is liable to punishment for having murdered B, the fact of B having been killed by A, the fact of A's motives and intentions at the time, the fact that he did it in self-defence or by accident or intentionally, would all be facts in issue because out of them, taken conjointly with one another, would arise A's liability to punish-

ment. Any other facts, bearing on, or connected with these facts in issue in any of the manners pointed out in Chapter II, are relevant facts.

(4.) "Evidence," as thus technically defined, does not include the whole material of the Judge's belief; for instance a Magistrate or Session Judge may question the prisoner, (see Crim. Pro. Code, Secs. 193 and 250,) and the prisoner's answers to the Magistrate may be used against him in other trials: but they are not 'evidence' under this definition as not being made by a witness. So also the examination of the accused before the Committing Magistrate is to be given in evidence at the Sessions trial (C. P. C., S. 248): and where one of several accused persons makes a confession involving himself and some of the co-accused, it may be taken into consideration as against the person so involved, see *post*, Section 30. These statements are excluded from the definition of evidence probably to mark the smaller degree of credibility, as a general rule, attaching to them. Another important ingredient of belief, which does not fall within the definition of 'evidence' is the Judge's own observation of the witness' demeanor and appearance. It has been objected that the Act omits a third class of evidence, viz., the evidence of things actually produced for the ocular inspection of the Court. "In the Code" says Mr. Norton,* "no mention is made of the evidence of Things." This is not, it is submitted, quite accurate. Provision is made for this matter in the last clause of Section 60, where it is enacted that wherever oral evidence is given about the existence or condition of a material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection. The reason for the omission of things so produced, as a distinct class, is correctly pointed out by Mr. Norton, viz., that they cannot form part of the facts of the case except by means of oral evidence, and so properly fall under it, as provided in Section 60.

(5.) Absolute certainty is seldom to be had in the affairs of life, and we are frequently obliged to act on degrees of probability which fall very far short of it indeed. Practical good sense and prudence consist mainly in judging aright whether in each particular case the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly. A merchant receives intelligence that some firm is solvent, or that the rate of exchange will vary, or that some change in the tariff will be introduced: a General gets some information about the movements or resources of the enemy: the success of either will depend on his judging soundly and well when he ought to act on the assumption that what he hears is true, or when prudence bids him assume it to be false: if he waited for absolute certainty, he would never act at all. In like manner all that a Judge need look for is such a high degree of probability that a prudent man, in any other transaction where the consequences of mistake were equally important, would act on the assumption that the thing was true. This doctrine was thus laid down by Pollock, C.B. in *R.* v. *Manning*. "If the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is, the

* Norton, p. 87.

degree of certainty which the law requires, and which will justify you in returning a verdict of guilty."]

"May presume." 4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Shall presume." Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof." When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[The effect of this section is to do away with the distinction known to English Law between presumptions of fact and presumptions of law, presumptions of fact being those natural inferences which our experience of the world around us leads us to draw from certain facts: presumptions of law being certain artificial inferences which, either from their recognized probability, or for some other cause, the law directs to be drawn from certain facts. The matter was further complicated by the recognition in English Text Books of a third class, mixed presumptions of law and fact, cases in which the presumption was partly natural and partly artificial. Under the present Act these divisions are lost sight of, and all presumptions fall under one or other of the three classes mentioned in the present section. The first and by far the largest class includes all those natural inferences which the "common course of natural events, human conduct and private and public business" suggest to us. Our experience of the world, for instance, leads us to infer that a man, who is in possession of stolen goods shortly after the theft and can give no account of them, either is the thief or has received them knowing them to be stolen: our knowledge of the regularity with which public business proceeds leads us to infer that an official act has been regularly performed: our knowledge of human nature leads us to infer that a man, who does not answer a question, could not answer it in a manner favourable to himself. Such inferences are formed, not by virtue of any law, but by the spontaneous operation of the reasoning faculty: all that the law does for them is to recognize the propriety of their being so drawn, if the Judge think fit. The Court *may* presume them, *i. e.*, may either draw the inference at once, and call on the opposite party to disprove it, or may refuse to draw the inference and call for proof of it, independent of the facts by which the inference was suggested. Thus, in the case of a man found in possession of stolen goods shortly after the theft and unable to account for his possession, the Court may either presume the guilt of the accused and throw

upon him the onus of proving his innocence; or it may refuse to presume the guilt and may throw upon the prosecution the burthen of proving it.

Besides these natural presumptions there are several instances, dealt with in Sections 86—88, and 90 in which the Court is, in like manner, empowered to throw the burthen of proof on which party it pleases, to presume a fact or to call for proof of it, as it thinks best.

The next class is of those cases in which the Court *shall* presume a fact; here no option is left to the Court, but it is bound to take the fact as proved until evidence is given to disprove it, and the party interested in disproving it may produce such evidence if he can. Presumptions of this sort are mostly provided either (1) where from the nature of the case the truth of the thing presumed is in a high degree probable, as, for instance, the genuineness of a document purporting to be the *Gazette of India* or of a duly signed record of evidence; or else, (2) when it is the policy of the law to assume certain things until they are disproved, as, for instance, that a document, called for and not produced, was duly stamped, attested, and executed, (Sec. 89,) or that circumstances bringing an offence within the exceptions to the Indian Penal Code do not exist. (Sec. 105.)

The third class is of those cases in which one fact is "conclusive proof" of another. An artificial probative effect is given by the law to certain facts, and no evidence is allowed to be produced with a view of combating that effect. These cases generally occur where it is against the policy of Government or the interests of Society that a matter should be further open to dispute. Thus Judgments of certain Courts are conclusive proof of certain matters stated in them, Section 41: birth during a valid marriage is, with certain exceptions, conclusive proof of legitimacy: and a notification in the *Gazette of India* of a cession of British Territory is conclusive proof of a valid cession having taken place.

For instances in which the Court "*may presume*," see Sections 86, 87, 88, 90 and 114; for instances in which it "*shall* presume," see Sections 79—85: for instances of "conclusive proof," see Sections 41, 112, and 113.]

CHAPTER II.

OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.[1]

Explanation.—This section shall not enable any person to give evidence of a fact which he is disen-

titled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a.*) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue—
A's beating B with the club;
A's causing B's death by such beating;
A's intention to cause B's death.

(*b.*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

[(1.) Each of the facts mentioned in Illustration (*a*) being facts in issue, inasmuch as, taken together, they establish the liability of A to be convicted of murder, (see Sec. 3,) evidence of them may be given. The remaining sections of the Chapter deal with facts, which though not 'facts in issue' are so connected with or related to some fact in issue, that the law allows evidence of them to be given for the purpose of increasing or decreasing its probability; such facts are therefore called relevant.

"Hereinafter" in the first paragraph, must include not only this Chapter 5—55, but Sections 145, 146, 148, 153, 155, 156, 157, 158.]

Relevancy of facts forming part of same transaction.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.(1)

Illustrations.

(*a.*) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b.*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c.*) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d.*) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

[(1.) There are facts which are described in the Text Books as being part of the "*res gestæ*." The expression 'form part of the same transaction' is of course somewhat vague, and is intended to throw on the Judge the task of deciding whether the facts to be proved and the facts in issue are so closely and immediately connected with each other as practically to constitute a single group, each of which must be considered in order to understand the rest.

Contemporary statements are often, of course, "facts forming part of the transactions" to which they relate; and might with equal propriety be shown to be relevant under this section, or Section 8, 9, or 14. Thus in Lord George Gordon's Trial for treason, it became necessary to inquire whether certain proceedings, in which a riotous mob were headed by the accused, amounted to the offence; and the cries of the mob were admitted as evidence against him. So in O'Connell's Trial, where the accused were charged with summoning monster meetings for an illegal purpose, papers publicly sold at the meetings and banners paraded were received in evidence of their objects, though no evidence was given connecting the accused with the sale or with the persons selling.—*Tayl.*, § 387.

So again where the buyer bought of the sellers stating that he bought for G. & Co., and giving B as a reference as to his (the buyer's) trustworthiness; and in a suit the question arose whether the buyer bought on his own behalf or on account of G. and Co., the Court of Exchequer held that a letter from the sellers to their Agent, directing him to make inquiries of B concerning the buyer and stating that they (the sellers) had sold the goods on account of G. and Co., was admissible, as part of the "*res gestæ*" between the buyer and the sellers, to prove that the sellers had sold on the credit of G. and Co., and not on that of the buyer.—*Milne* v. *Leisler* 31 *L. J., Ex.*, 257. Such a letter might be shown to be relevant, according to the present Act, under this section or Section 8, 9, or 14, or under Section 21. Sometimes acts may 'form part of the same transaction' though they occur at distant places or different times; when, for instance, a man committed three burglaries in one night, and stole a shirt in one place and left it in another, evidence of all these burglaries was admitted, on the ground that "of crimes so intermixed, the Court must hear the detail."—*R.* v. *Whorley*, 2 *Leach*, 985.

Illustration (*a*) shows that the admissibility of statements of bystanders will depend, not, as is the general rule in English Law, on the question whether the party, against whom the evidence is given, was present when the statement was made: but on the question whether the statement was made so shortly before or after the transaction as to form part of it. The mere fact of the accused not being present would not be ground for its exclusion. Sometimes such statements are the best possible evidence. Suppose, for instance, that the question is whether A committed a murder at a particular house and time: a number of men are sitting in a room, one of them, B, looks out of the window, and says, "there goes A;" immediately afterwards screams are heard, the men rush out, and find the murdered

person's corpse and the murderer fled. B's statement would be relevant as part of the transaction. It would also be admissible under Section 157 by way of corroborating B's evidence.]

Facts which are occasion, cause, or effect of facts in issue.

7. Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a.*) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b.*) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c.*) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of A, known to B, which afforded an opportunity for the administration of poison, are relevant facts.

[Section 6 having dealt with facts admissible as forming part of the transaction, under inquiry, Section 7 embraces a larger area, and, leaving the transaction itself, extends to facts which have directly or indirectly occasioned it, or which have been occasioned by it, or which though they cannot be said to have occasioned it, gave an opportunity for its occurrence or constituted the state of things under which it occurred.

Illustration *(a)* is an instance of facts relevant as giving occasion or opportunity : *(b)* of facts constituting an effect : *(c)* of facts constituting the state of things under which an alleged fact happened.

In the trial of Captain Donnellan for poisoning Sir Theodosius Boughton with distilled laurel water, it was proved that Sir Theodosius was ill at the time of a trifling complaint for which he was taking medicine ; that laurel leaves were to be had in the garden ; that the accused frequently practised distillation in a room which he kept locked up : that Sir Theodosius used to lock up the phials containing his medicine in an inner room, and that, having on one occasion forgotten to take it, he was recommended by Donnellan to leave it in an outer room ; that Donnellan had an interest in Sir Theodosius' death, and took opportunities of falsely representing his health to be far worse than it really was. All these would be relevant facts under this and the following section.—*Benth. Rat. Evid.*, vii, 19.]

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.(1)

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements: but this explanation is not to affect the relevancy of statements under any other section of this Act.(2)

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.(3)

Illustrations.

(*a.*) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(*b.*) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(*c.*) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(*d.*) The question is whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(*e.*) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f.*) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B,'—and that immediately afterwards A ran away, are relevant.

(*g.*) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A, for he owes B 10,000 rupees,'—and that A went away without making any answer, are relevant facts.

(*h.*) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(*i.*) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(*j.*) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, (one), or

as corroborative evidence under section one hundred and fifty-seven.

(*k.*) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, clause (one), or

as corroborative evidence under section one hundred and fifty-seven.

[(1) This section is an amplification of the preceding one. When one is considering the cause or occasion of a fact, or the state of things under which it happened, nothing can be more material than

to know whether any person had an interest in its happening, or took any measures calculated to bring it about. Thus motive and preparation become of the utmost importance. If A is found murdered, the fact that B had a strong motive for wishing A dead is, so far as it goes, a piece of evidence against B. So if A is poisoned with arsenic, the fact that B, shortly before, procured arsenic, or made arrangements by which he would have access to A's food, points to B being the poisoner.

Of the Illustrations, (*a*) and (*b*) show motive; (*c*) and (*d*) preparation; (*e*) and (*i*) show conduct of a party to the proceeding in reference thereto; (*f*), (*g*) and (*h*) are specimens of statements made to or in the hearing of a person, whose conduct is relevant, influencing such conduct; (*j*) and (*k*) are specimens of statements accompanying and explaining the conduct of a person an offence against whom is being inquired into. The statement becomes relevant under this section as accompanying and explaining the conduct of the party in making a complaint. By English Law the details of the statement in such cases can be elicited only in cross-examination.—*Tayl.*, § 519. This restriction will not apply to proceedings regulated by the present Act.

(2) Express provision is made for statements of various kinds; under Section 10, statements by conspirators; Section 14, Illustrations (*k*), (*l*), (*m*), statements showing state of mind or body; Sections 17—31, Admissions; Sections 32—38, various statements by deceased persons and others; former statements of witnesses, Sections 155 and 157. The present section admits statements only so far as they accompany and explain acts. Thus in (*j*) if a woman goes and makes a complaint to her parents or other person of having been raped, the fact of such a complaint having been made is relevant under this section, and so is what she said in so complaining. But her mere statement of having been ravished, apart from a complaint, would, so far as the present section is concerned, be inadmissible, though it might be got in under other provisions of the Act.

(3) The provision contained in Explanation 2 lets in an important class of statements, those, namely, made to or in the presence of a party, whose conduct is in question, and which can be shown in any way to affect such conduct. The Illustrations given in (*f*), (*g*) and (*h*) show how important such statements may be in throwing light upon a person's motives, intention, good faith, &c. Care must, however, be taken not to apply the doctrine "He who keeps silence, consents" too freely, or to infer that because a man does not choose, on a particular occasion, to deny the truth of a thing, he is to be taken as impliedly admitting it. A statement may be a mere impertinence and best rebuked by silence; and especially when the observations are not addressed to a man himself, but are merely made in his presence, he is under no obligation to take any notice of them. This is still more the case when the statement is made not by a person interested in the proceedings but by a mere stranger. In such case they may naturally be left uncontradicted and a Judge would be acting very rashly who inferred acquiescence from silence. Again statements may be made in a man's presence which from the circumstances of the case he has no opportunity of replying to, and as to which, therefore, no inference can be drawn from his silence, *e. g.*, depositions in Court. In the same way statements to a man by letter may often be shown

to affect his conduct and may be most useful in explaining it: but here again great caution is necessary in drawing any inference from his silence.

"What is said to a man before his face, observed Lord Tenterden in *Fairlie* v. *Denton*, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains."—*Tayl.*, § 735.

But the statements whether oral or written must be shown to affect the conduct of the person to whom they are made, and therefore mere statements to a person which cannot be shown to be in any way connected with or to bear upon his conduct would be inadmissible. This point was much discussed in the well-known case of *Doe d. Tatham* v. *Wright*, 7 *A. and E.*, 400, where the question was as to the sanity of a testator at the time of making his will. "In order to determine that question," said Tindal, C. J., "I conceive all that was said, written or done by the Testator himself at any time during such period was the most direct and the best evidence to ascertain the state of his understanding; and that the next in degree, because intimately connected with it, would be all that was said to him, written to him, and done to him during the same period by his friends and others who had access to him, *provided always that what was so said, written or done to him by others is shown to have come to his actual knowledge;* but I consider this condition to be indispensable as to the admissibility of this second class of evidence; for as to what was *said by others*, but not heard by the party whose understanding is the subject-matter of inquiry, or *written by others* but which never reached him, or *done by others* but never known by him to have been done, it appears to me that such speaking or such writing or such acting can amount to no more than an *expression of the opinion* of the speaker, or writer or actor, and that such opinion not having been given on oath, and not being subject to cross-examination as to the grounds on which it was originally formed or continued, cannot on that account be deemed admissible in evidence."]

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, or relevant in so far as they are necessary for that purpose.

Illustrations.

(*a.*) The question is whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(*b.*) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(*c.*) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(*d.*) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(*e.*) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(*f.*) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

[Having, in the previous sections, disposed of facts which are relevant as, having in one way or other, *caused* a fact relevant or in issue, we now come to facts which are relevant either (1) as *explaining or introducing* a fact relevant or in issue, of which an Illustration is given in (*a*), (*b*), (*d*), (*e*) and (*f*) or, (2) as supporting or rebutting an inference suggested by any such fact, as in Illustration (*c*) where evidence may be given of facts to rebut the inference suggested by A's sudden departure: or (3) to establish the identity of any person, or to fix the time or place at which anything happened, when these points are relevant or issue: or (4) to show the relation of the parties. As Sections 7 and 8 provided for facts *causative* of a fact relevant or in issue, this section may be said generally to provide for facts *explanatory* of any such fact. It will be observed if a statement can be shown to be thus explanatory, it is admissible, perfectly irrespective of whether the person against whom it is given heard it or was present when it was made. Thus in Illustrations (*d*), (*e*) and (*f*) the person affected may have been perfectly unconscious of the statement: none the less is it admissible as explanatory of a fact in issue or relevant. It is 'presumed' says Mr. Norton* as to Illustrations

* Nor., p. 112.

(*d*) and (*e*) the statements made by C in the one case and D in the other are only to be receivable as evidence that such statements were made, as declarations accompanying an act, not of the truth of them as affecting B or A respectively. Without some proof of authority given by the parties to be affected to those making the statements, it is clear that a very dangerous innovation is introduced, whereby persons may suffer in life, person or property, by statements put into their mouths from behind their backs, a principle which the Law of Evidence has hitherto eschewed." This, it is submitted, gives a narrower scope to the two Illustrations in question, than can have been intended. Their effect is, confessedly, to make statements, made behind a person's back relevant, provided that such statements are explanatory of a fact which is itself in issue or relevant. Whether this is dangerous innovation is a matter of opinion: the framers of the Act apparently thought otherwise. They may have considered that, though such statements might weigh heavily against a man on some occasions, they might weigh strongly in his favor on others, and that, if evidence of a fact is to be given at all, it is desirable that what was said about it at the time of its occurrence should be proved as well as the other parts of the transaction.

In a case in which the question was whether A had stolen some chaff from B, B gave evidence that the chaff found at A's house was similar to that lost by B, and that in both there was linseed. A was allowed to give evidence to explain the presence of linseed in the chaff found with him and so rebut the inference suggested by its presence.—*Wright* v. *Wilcox*, 19 *L. J., C. P.*, 333.]

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

(*a*.) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the

conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

[The provisions of this section are considerably wider than the English Law. Not only are statements made by one conspirator *in furtherance of the common design* relevant as against the other conspirators, but anything said, done or written by any conspirator *in reference* to the common design is relevant against any other person who is reasonably believed to have joined in the conspiracy, although such thing may have been said, written or done before he joined the conspiracy, or after he left it. A mere narrative of the plot would be admissible; and so would papers, written by one of the conspirators about the plot, although such papers may not have been in existence when the accused was taken into custody. In England only statements of conspirators *in furtherance of the common design* can be proved, and important evidence is often thus shut out.

For instance on the trial of A and B for conspiring to cause imported goods to be carried away without payment of duty, with intent to defraud the revenue, it was proposed to use as evidence against B, the counterfoil of A's cheque-book, which purported to show that part of the duty, of which the customs had been defrauded, had been paid to B. This was excluded as not being an act done in pursuance of the conspiracy, but a mere statement of the result of the conspiracy.—*R.* v. *Blake*, 6 *Q. B.*, 126. It would be clearly admissible under the present section. The statement, however, must refer specifically to the common design, and not merely to the subjects with which the design may be remotely connected. Thus in the case of Algernon Sidney, a treatise containing speculative republican doctrines, which not only was unpublished and unconnected with the treasonable practices of which he was accused, but which appeared to have been composed several years before the trial, was under the auspices of Judge Jefferies, admitted in evidence.—*Tayl.*, § 533. This would not be admissible under the present section.

The section extends also to persons who have conspired to commit an actionable wrong, and therefore the statements of one co-trespasser, if there is a reasonable ground for believing a conspiracy to have existed, are admissible against the other co-trespassers. Thus in an action for false imprisonment, the declarations of a co-defendant shewing personal malice, have been admitted in the English Courts, as evidence against the other defendants, though made in their absence, and several weeks after the act complained of.—*Tayl.*, § 534.

It is to be observed that in order to bring the section into operation there must be, in the first place, reasonable ground to believe in the existence of the conspiracy: that being shown, any of the facts mentioned in the section are relevant, as well to prove the existence of the conspiracy, as to implicate each of the conspirators. If there was *primâ facie* evidence that two or more persons were acting in concert to a common end, or if, supposing concert not to be directly proved, if their acts so dove-tailed into and supplemented each other as to produce a particular result not likely to be produced without a previous design, this would, it is submitted, be reasonable

ground for believing in the existence of a conspiracy within the meaning of the section.

It is often, of course, necessary to prove the acts of one person in order to explain the conduct or intention of another with whom he is acting jointly. Thus where A and B went together to a shop and A tendered a counterfeit coin, evidence of B having a number of counterfeit coins, wrapped up in a paper, on her person was admitted to show a guilty knowledge on a part of A, though no counterfeit had been found on A.—*R.* v. *Skerritt*, 2 *C. and P.* 427.]

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a.*) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that on that day A was at Lahore, is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(*b.*) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant.

[This section is of importance principally to the party whose object it is to *disprove* some fact which is asserted by the opposite side. There may be facts which have no connection with an alleged circumstance, except that they show it to be impossible or so highly improbable as to justify the inference that it never occurred. Of this an *alibi* is the most familiar instance. There may, on the other hand, be facts which though not forming part of the transaction, yet make the fact of its having occurred a matter of certainty. A warder, for instance, is locked up with 5 prisoners in a jail. He is found murdered. The facts that there was no one else in the jail, that no one could have got in, that 3 of the five prisoners were chained up in cells, and a 4th lying paralyzed in bed, are relevant as proving that the murder was committed by the 5th prisoner. Such facts might, with equal propriety, be proved under Section 7, as constituting the state of things under which a fact, in issue or relevant, occurred, or as having afforded an occasion for its occurrence.

Care must be taken not to give this section an improperly wide scope by a too liberal interpretation of the words "inconsistent" and "highly probable or improbable." Otherwise the section might seem to contain in itself and to supersede all the other provisions of the Act as to relevancy. The Illustrations show that the inconsistency referred to means a physical impossibility of the co-existence of two facts, as that a man should be in two places at the same time or within an interval of time too short to allow of his transit by any known means of locomotion from one to the other: by "highly improbable" is meant something, which, though not absolutely impossible, is next door to it. A man might be at such a distance from the scene of an offence as to make it, though not physically impossible, yet highly improbable that he could have been present at its occurrence: the fact that he was at such a distance would be a material consideration in forming an opinion as to whether he committed it, and would be relevant. Under this section evidence might be given of the sort of inconsistencies, which are so frequently the means of exposing a false story. Bentham instances the case of the *Comte de Morangiès*, where the question was whether a sum of money 300,000 francs had been received by the Count: this money was alleged to have been carried, in a particular manner and within a specified time, to his house. Evidence of facts showing this to be physically impossible was admitted, and would have been relevant under this section.—*Benth. Rat. Ev.*, vii, 62*n*.]

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

[As to character as affecting damages, see Section 55.

In actions for defamation, other libellous expressions by the defendant, whether used before or after the commencement of the suit, are admissible to prove malice and so enhance damages. On the other hand, evidence of circumstances, justifying the defendant's conduct, and showing he acted *bonâ fide* and without malicious intention, would be relevant.

So also, in mitigation of damages, the defendant may show facts tending to disprove malice, as *e. g.*, that rumors of the fact asserted were prevalent in the neighbourhood, *Richards* v. *Richards*, 2 *M. & R.*, 557, or that the statement was copied from another paper.—*Saunders* v. *Mills*, 6 *Bing.*, 213.

Doubts have been expressed as to whether, according to English Law, the defendant may, in such cases, show, in mitigation of damages, that the plaintiff, at the time of the publication of the libel, labored under a general suspicion of having committed the act imputed to him. Mr. Taylor discusses the question and points out in favor of the admissibility of such evidence that when a man demands damages for injury done to his general reputation, he ought to be prepared to show that he has a reputation to be injured, and therefore to rebut evidence of his general bad character. The weight of

English authorities is in favor of the admissibility of the evidence, and under the present section and section fifty-five, it would, it is apprehended, be admissible.

So also in actions for assault, the provocation offered by the plaintiff would be relevant : in the case of actions against Railway Companies for injuries received, the position and circumstances and earnings of the plaintiff, the precautions taken by the Company, and the contributory negligence, if any, of the plaintiff ; and in suits for breach of contract all facts showing the amount of loss occasioned to the plaintiff by the breach. See Contract Act, 1872, Section 73.]

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant—

(*a.*) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.

(*b.*) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

[There will often be a question as to whether the right or custom, shown to have been exercised on some particular occasion is identical with the right or custom which has to be proved. The customs of one manor are not, in England, admissible to prove the customs of another, *Marquis of Anglesea* v. *Lord Hatherton*, 10 *M. & W.*, 255, unless some connection can be shown between them, as, for instance, that the manors were originally held under one tenure. So also where evidence of a right *exercised in a particular locality*, is given, it need not be confined to the precise spot, as to which the inquiry is, so long as there is such a common character between the places, as to suggest a reasonable inference that the same state of things existed in each. In *Jones* v. *Williams*, 2 *M. & W.*, 326, the question was as to a right of ownership, as shown by certain acts of enjoyment, and Baron Parke in deciding that evidence of such acts should be admitted, said, "I am also of opinion that this case ought to go down to a new trial, because I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that

the entire hedge and bed of the river, and, consequently, the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; *evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did.* In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same enclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person; though it by no means follows as a necessary consequence; for different persons may have balks of land in the same enclosure; but this is a fact to be submitted to the jury. So, I apprehend, the same rule is applicable to a wood which is not enclosed by any fence: if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary surrounding the whole; and the case of *Stanley* v. *White*, 14 *East*, 332, I conceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person, by showing acts of ownership on his part along the same fence. It has been said in the course of the argument, that the *defendant had no interest to dispute the acts of ownership not opposite to his own land; but the ground on which such acts are admissible is not the acquiescence of any party: they are admissible of themselves, proprio vigore, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight.* That observation applies only to the effect of the evidence. Applying that reasoning to the present case, surely the plaintiff, who claims the whole bed of the river, is entitled to show the taking of stones, not only on the spot in question, but all along the bed of the river, which he claims as being his property; and he has a right to have that submitted to the jury. The same observation applies to the fence and the banks of the river. What weight the jury may attach to it is another question."]

Facts showing existence of state of mind, or of body or bodily feeling.

14. Facts showing the existence of any state of mind—such as intention, knowledge,[1] good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

Explanation.—A fact relevant as showing the existence of a relevant state of mind must show that it exists, not generally, but in reference to the particular matter in question.(2)

Illustrations.

(*a.*) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(*b.*) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

(*c.*) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(*d.*) The question is whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(*e.*) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(*f.*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(*g.*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management

of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(*h.*) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i.*) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(*j.*) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(*k.*) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(*l.*) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(*m.*) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(*n.*) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(*o.*) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(*p.*) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

[We now come to evidence as to states of mind or body, with which this and the following section expressly deal, the present section providing generally for the subject, and section fifteen providing for the special mode of proving a thing to have been intentional by showing that it formed one of a series of similar occurrences.

States of mind, knowledge, intention, &c., are among the most important topics with which judicial inquiries are concerned. In criminal cases they are invariably a main consideration ; and in civil cases they are often highly material, as, for instance, where there is a question of fraud, malicious intention in libels, &c.

The simplest and most direct mode of proving a state of mind would be, of course, the evidence of the person himself stating in Court what his mental feelings, at a particular time, were. This evidence is, however, for obvious reasons, in many cases untrustworthy, and in other cases is not to be had, and the state of mind must be inferred from its outward manifestations ; these may be either words or deeds. Whether a man says, "I was in a perfect fury this morning," or whether he knocks down his servants and smashes his furniture, there is evidence in either case from which his state of mind may be inferred. The first four Illustrations give instances of the mode in which knowledge may be proved : Illustrations (*e*) to (*j*) deal with various intentions, malice, fraud, murder, &c. ; (*k*) shows how person's expressions of feeling towards each other at about any particular time may be used to show what those feelings were : and (*l*) and (*m*) show the same thing in regard to states of body. It will be observed that this section gets rid of all technicalities as to the class of cases in which evidence, given under it, is admissible, or the time within which the fact, given as evidence of mental or bodily condition, must have occurred : the only point for the Court to consider, in deciding on the admissibility of evidence under its provisions, is whether the fact can be said to *show the existence* of the state of mind or body under investigation.

The acts of one person may sometimes serve to indicate another person's state of mind. Thus in a suit where the question was whether the defendant knew at the time of a contract, made with the plaintiff, that the plaintiff was insane, evidence of the plaintiff's conduct on various occasions before and after the contract was held admissible for the purpose of showing that the plaintiff's malady was of such a nature as would make itself apparent to the defendant at the time of the contract.—*Beavan* v. *McDonnell*, 23 *L. J., Ex.*, 336.

Such evidence would be relevant under the present section for the purpose of showing that the defendant was not acting in good faith.

(2) Illustrations (*n*), (*o*) and (*p*) have reference to the Explanation. The meaning is that the state of mind to be proved must be, not merely a general tendency or disposition towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct, immediate reference to the matter which is under inquiry. The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings does not bear with sufficient directness on his conduct on any particular occasion or as to any particular matter to make it safe to take it as a guide in

interpreting his conduct: what is wanted is a fact which will throw light on his motives and state of mind *with immediate reference to that particular occasion or matter.* Illustrations (*a*) and (*b*) make this clear. A man is accused of receiving stolen goods with guilty knowledge: if he is merely shown to be generally dishonest, the probability of his having been dishonest in this particular transaction is perhaps increased, but only in a vague and indefinite way: but if, at the time, he is found in possession of a number of other stolen articles, this fact throws a distinct light on his knowledge and intentions as to the articles of which he is found in possession; it would be dangerous to infer that because a man was generally dishonest, he was dishonest in any single case: but it is not dangerous to infer that a man, who is found in possession of 50 articles stolen from different people, came by each and all in a dishonest manner.]

Facts bearing on question whether act was accidental or intentional.

15. When there is a question whether an act was accidental or intentional the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations.

(*a*.) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different Insurance office, are relevant, as tending to show that the fires were not accidental.

(*b*.) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(*c*.) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to A was not accidental.

[This section is an enlargement of the English Law, which, though it admits evidence of this kind in some cases, *e. g.*, counterfeiting or forgery, or uttering counterfeit coin, excludes it in others. Thus, "in an indictment against a thief or receiver, the fact that the person has at various times received and pledged other property stolen from different persons cannot be given in evidence: though if it can be shown that the chattels so received and pledged have been stolen

from the prosecutor, the evidence will be admissible as raising some presumption of guilty knowledge with respect to the articles mentioned in the indictment."—*Tayl.*, § 323. Such evidence would be admissible under the present section if it could be made to show a series of similar occurrences, and so that the prisoner had not come accidentally into the possession of the stolen goods.

Another restriction of English Law is that, though on an indictment for uttering a forged note, other utterings of forged notes may be proved, evidence cannot be given as to what the prisoner said or did at the time with respect to such other utterings.—*Tayl.*, § 322. Under the present law, as the other utterings are relevant facts, statements accompanying and explaining such facts would be relevant under Section 8, or Section 9.

Evidence of a fact forming one of series has, however, been admitted in England in cases in which it goes far to disprove accident. Thus where four indictments were preferred against a woman on a charge of having poisoned her husband and two of her sons and of having attempted to poison a third, on the trial of the first of the indictments only, evidence that arsenic had been taken by the three sons shortly after their father's death, that all parties when ill exhibited the same symptoms, and that the woman lived in the house and prepared the meals, was admitted, though the indictment dealt with the husband's death only, for the purpose of showing that his death was caused by taking arsenic and was not accidental.—*R.* v. *Geering*, 18 *L. J.*, *M. C.*, 215.

Existence of course of business when relevant.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.(1)

Illustrations.

(*a.*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.(2)

(*b.*) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

[(1.) The existence of any such course of business should be clearly made out. An attempt is often made to give evidence of facts which form no part of the transaction in question and have no real connection with it, on the ground that they give rise to an inference that what happened in the one case would probably happen in the other. Thus in a suit between a landlord and tenant, when the issue was whether the rent was payable quarterly or half-yearly, evidence of the mode in which other tenants paid their rent would be inadmissible, unless a regular course of business, according to which all tenants invariably paid their rent, could be shown; so when the point in issue was whether the beer supplied by a brewer was good,

evidence as to the goodness or badness of beer supplied by the same brewer to other customers would be inadmissible, because it does not necessarily follow that all customers got the same quality of beer; but the case, it is apprehended, would be different, if it be shown that beer of the same brewing had been supplied under the same circumstances, to other customers, so as to establish a connection between the two deliveries.—*Holcomb* v. *Hewson*, 2 *Camp.*, 391.

In the same way when the question was as to the terms of a contract for certain guano, evidence was offered as to the terms of other contracts for guano made by the same defendant, and rejected on the ground that there was no reason, because a man had done a thing once, that he should do it again, and that no connection between the two contracts had been made out. But the case would obviously be different if it could be shown that according to a regular course of trade all guano contracts were invariably in certain terms.

So where A was sued on a Bill of Exchange accepted in his name by B, in order to prove that B had general authority to accept bills in the name of A, evidence was admitted of A's having acknowledged his liability on another bill accepted in his name by B.—*Gibson* v. *Hunter*, 2 *H. B.*, 288.]

(2.) This seems to supply the place of Sections 50 and 51 of Act II of 1855, which provided (1) that when a letter book, duly kept is produced, and it is proved that a letter copied into it was despatched in the ordinary course, the Court may presume its despatch: and (2) that when a book is kept for marking despatch and receipt of letters and a letter is entered as received, the entry shall be *primâ facie* evidence of its receipt.

These facts would, under Section 114, justify the Court in presuming despatch or receipt.]

ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admissions defined.

[An admission, under the above definition, is a statement as to certain things made by certain persons, *whatever be the inference which it suggests.* Whether, therefore, the statement denies or admits a fact, it will be equally an admission, if it complies with the requirements of the following sections. It must be observed that, under the present Act, an admission has not the effect of precluding the person who made it from giving evidence to contradict it: an admission is evidence of the fact stated, and often of course very strong evidence: but it is not conclusive proof, (see Section 31), and unless the person making it is estopped under the provisions of Sections 115—117, he is at liberty to contradict it if he can.]

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the

Admission—

by party to proceeding or his agent;

circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.(1)

by suitor in representative character;

Statements made by parties to suits suing(2) or sued in a representative character are not admissions, unless they were made while the party making them held that character.

by party interested in subject-matter;

by person from whom interest derived.

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested,(3) or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,(4)

are admissions if they are made during the continuance of the interest of the persons making the statements.(5)

[(1.) As the rule admitting the declarations of the agent is founded upon his legal identity with the principal, they bind only so far as the agent had authority to make them.—*Tayl.*, § 540. Care must therefore be taken, as to statements by agents and servants, to see that they are of such a nature as to fall within the scope of the agent's employment, and are such as the agent is expressly or implicitly empowered by his principal to make. Thus what is said by an agent respecting a contract or other matter in the course of his employment, is an admission as against the principal in a suit grounded on such contract or matter; but what he said by him on another occasion is not an admission.—*Peto* v. *Hague*, 5 *Esp.*, 134.

Accordingly "when a horse dealer or livery-stable keeper employs a servant to sell a horse, any statement made by him at the time of sale, even though it amount to a warranty of soundness, which the servant has been really ordered not to give, will, as it seems, bind the master; but the servant's declarations or acknowledgments at any other time, whether made to a stranger or to the purchaser, will not be received."—*Brady* v. *Tod.*, 30 *L. J., C. P.*, 224. The test is whether the person making the statements was expressly or impliedly authorized by his employer to do so: thus a statement by a Night Inspector at a Railway station, that he had forgotten to forward certain cattle, was excluded on the ground that it did not fall within the scope of his duties to make admissions as to past transactions. —*Willis* v. *Great Western Railway Company*, 34 *L. J., C. P.*, 195.

Where a petitioning creditor, knowing that his servant could prove

a particular act of bankruptcy, sent him expressly for that purpose to be examined at the opening of the fiat, the depositions so made were held to be evidence of the act of bankruptcy, as against the petitioning creditor, where that fact was put in issue in an action brought against him by the assignees.—*Tayl.*, § 691. Under the present section the question would be whether the servant was, under the circumstances, an agent of the petitioning creditor, authorized to prove the act of bankruptcy. If he was, the servant's statement would be an admission as against the creditor. With regard to Counsel, Attorneys, Pleaders, &c., they would doubtless be regarded by the Court as empowered to make admissions on behalf of their clients in all matters relating to the progress and trial of the cause.

With regard to facts admitted in Court by the parties *or their agents* it will be seen at Section 58 that, when such admissions are made, the Judge may dispense with proof and regard the admitted fact as proved: a party might accordingly find himself precluded from subsequently contesting a fact so admitted. The principle has been thus laid down in the Privy Council. The admission and consent of a Vakeel, made with due authority, will bind his client, though not present at the time of making it: where, therefore, an order was made for the payment of a certain sum, being the moiety of the profits of an estate, founded on an amount calculated in a particular manner, which amount was admitted and assented to by the Vakeel in Court, and the order made accordingly,—held by the Judicial Committee (affirming the Judgment of the Court below), that such consent was binding on the client, and precluded him from afterwards opening the account.—(*Rajunder Narain Rai* v. *Bijai Govind Sing*), 2 *M. I. A.*, 517.

The question as to whether a wife has authority to make a statement, so as to render it an admission as against her husband, must depend on the facts of the case, as with any other agency: it will "turn on the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question."—*Tayl.*, § 698. It will not follow because she has authority to make admissions as to one matter, that she is empowered to make admissions as to another.

Thus when a wife, by her husband's authority, carried on the business of a shop, and attended to all the receipts and payments, the Court held that admissions made by her to the landlord of the shop respecting the amount of rent were not admissible to bind the husband. Had the admissions related to the receipt of shop goods they would have been evidence; but the fact that she was conducting a business for her husband, did not constitute her his agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for the future occupation of it.—*Meredith* v. *Footner*, 11 *M. & W.*, 202.

The declarations and acts of an agent cannot bind an infant, because an infant cannot appoint an agent.—*Tayl.*, § 541. But so far as the validity of the admission itself is concerned, it matters not whether the person who made it was, at the time of making it, of full age. Accordingly, in an action against a person for goods supplied to him during minority, admissions by him while a minor may be used.—*Tayl.*, § 669.

(2) There are conflicting decisions of the English Courts as to whether statements of a person suing as representative of others, made before he became such, should be regarded as admissions. Under the present law they will be excluded, as not being made while he held his representative character.

(3) This would make the statements of joint-tenants, tenants in common, co-sharers, partners, &c., admissions against other persons similarly interested in the property in question. Admission by a *cestui-que-trust* would, in the same way, be admissions as against the trustee suing in his capacity as trustee.

As to admissions of indebtedness by one co-debtor for the purpose of preventing a debt being barred by limitation against another co-debtor, see Act IX of 1871, Section 20, Explanation 2.

(4.) Thus statements of the ancestor would be admissions as against the heir; statements by a grantor or donor would be admissions against the grantee or donee; statements by a former holder of an office as against his successors in it; statements of a testator as against his executor; statements of an intestate as against his administrator. So, again, any declaration by a landlord, in a prior lease, which is relative to the matter in issue, and concerns the estate, has been received in evidence against a lessee, who claims by a subsequent title. But the statements of a tenant for life are not admissions as against the remainder-man or reversioner, because the one does not derive his interest from the other, though he comes into possession of it subsequently to him.

(5) "With respect to the time and circumstances of the admission," says Mr. Taylor, "it may first be observed that whenever the declarations of a third party are offered in evidence on the ground that the party, against whom they are tendered, derives his title from the declarant, it must be shown that they were made at a time when he had an interest in the property in question; because it is manifestly unjust that a person who has parted with his interest in property should be empowered to divert the right of another claiming under him by any statement that he may choose to make. Thus the admission of a former party to a Bill of Exchange, made after he has negotiated it, cannot under any circumstances be received against the holder; and where a person had, by a voluntary post-nuptial settlement, conveyed away his interest in an estate, and afterwards had executed a mortgage of the same property, it was held, that his admission that money had actually been advanced upon the mortgage could not be received on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void. So, also, the declaration of a bankrupt, though good evidence to charge his estate with a debt, if made before his bankruptcy, is not admissible at all, if it were made afterwards. This most just and equitable doctrine will be found to apply to the cases of vendor and vendee, grantor and grantee, and generally to all cases of rights acquired in good faith previous to the time of making the admission in question."—*Tayl.*, § 719.]

Admissions by persons whose

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are

position must be proved as against party to suit.

admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

[Thus, where A guaranteed the payment for such goods as the plaintiffs should send or deliver to C in the way of trade, a statement by the principal debtor, C, that he had received goods, would be an admission as against the surety A, inasmuch as it would be relevant in a suit brought against C.]

Admissions by persons expressly referred to by party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration.

The question is, whether a horse sold by A to B is sound.

A says to B—'Go and ask C, C knows all about it.' C's statement is an admission.

[This, however, will not give the force of an admission to everything stated by a witness, as against the party who calls him. These must be an *express reference for information* in order for the statement to become an admission.

Thus if A says "I will pay you, if B says I owe it you," B's statement about the matter will be an admission as against A.

So when the question was as to a forged note, paid by B to A. B said "if I have paid it away I had it from C, go and inquire of C about it;" C's statement is an admission as against B.]

Relevancy of admissions against or in behalf of persons concerned.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases :—

(1.) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section thirty-two.

(2.) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.[1]

(3.) An admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.[2]

Illustrations.

(*a.*) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(*b.*) A, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section thirty-two, clause (two).

(*c.*) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section thirty-two, clause (two).

(*d.*) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e.*) A is accused of fraudulently having in his possession counterfeit coin, which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

[(1) The rules provided by this section are grounded on the principle that previous statements of the parties ought to be admissible only when the circumstances are such as to render their truthfulness eminently probable. If a man might bring evidence promiscuously to prove statements made by himself favorable to his own case, nothing would be easier than for a party who had a weak case to strengthen it by making such statements before-hand, or by suborning witnesses to speak to having heard him make such statements. A vast mass of the most worthless evidence would thus be imported into the case. This is guarded against in the present section by the general rule that statements made by a man can be proved, not by or on behalf of himself, but only by or on behalf of his antagonist; so that it will be only such of his statements as make against his cause and favor that of his antagonist that will be let in; and such statements may of course be generally relied on as truthful. This rule, however, if enacted without any relaxations, would work harshly, as there are some statements which, though they are in the interest of the person making them, are yet from some particular circumstance deserving of especial credit. Such for instance are the statements mentioned in section thirty-two of the Act, to which Illustrations (*b*) and (*c*) refer. The entries which a man makes in the regular course of his business are presumably truthful, and though they happen to be in his favor, he ought not to be debarred from proving them as part of his case. So with regard to the admissions specified in (2) it would, no doubt, be dangerous as a general rule, to allow a man to prove on his behalf his own statements as to his feelings; but the danger is guarded against by the proviso that the admission, in order to be admissible, must be made about the time when the feeling existed, and be accompanied by conduct rendering its falsehood improbable. So also with regard to the cases provided for in (3), of which Illustrations (*d*) and (*e*) give instances. In all alike there is something which rebuts the probability that what a man says may be unduly influenced by the wish to better his own case.

The principle, on which such statements are admissible against but not in favor of the declarant, was exemplified in a recent English case.

The carriage of P was driven against the carriage of M, whereby M's thigh was broken. On the trial of an action by M against P for this, S, a surgeon, was called as a witness for M; M recovered 600£ damages against P. S afterwards brought an action against M for his services as a surgeon in attending M after his thigh was broken. The counsel of S proposed to go into evidence to show what S stated as to the amount of his charge for attendance on M in giving his evidence on the trial of the action by M against P:—Held, that such evidence was not admissible.—*Sutherland* v. *M'Laughlin, Car. & M.*, 429.

This statement was held to be inadmissible for him, though it would have been admissible against him; it would, however, be admissible under the present Act for him as corroborative evidence under Section 157.

So, in an action for falsely representing the solvency of a stranger, whereby the plaintiffs were induced to trust him with goods, statements by them at the time when the goods were supplied, that they trusted him in consequence of the representation, would be admissible on their behalf, either under (1) as made in the ordinary course of business, or, under (2), as a statement as to state of mind, made about the time and accompanied by circumstances rendering its falsehood improbable.

Frequently statements made by persons under legal compulsion become admissions in another proceeding. They do not cease to be admissions in Civil cases because made under compulsion. See *post*, Section 132. "Thus affidavits sworn by a party in former legal proceedings, answers filed by him in Chancery in a former suit, evidence given by him in an action at law, or his examination taken before commissioners of bankruptcy, will be evidence against himself in a subsequent cause and this, too, though his subsequent opponent was a stranger to the prior proceeding."—*Tayl.*, § 723.

(2) Thus the recitals in a deed admissible as a transaction by which a right was asserted, &c. would be admissible under Section 13, though they will be excluded as admissions.

Mr. Norton considers that the provisions of these sections, so far as regards admissions by agents,* must be restricted to Civil cases. The wording of Section 23, where a provision is expressly confined to Civil cases, does not favor this view.]

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

[This is a change from the English Law, according to which the oral admission of a party as to the contents of a document is admitted, even when the document might have been produced, as evidence against him.—*Slatterie* v. *Pooley*, 6 *M. & W.*, 669.

The propriety of the rule, however, has been much questioned, on the ground that, though what a party himself admits may reasonably be presumed to be true, there is no such presumption in favor of the truthfulness of the evidence by which such admission must be proved. "The doctrine," said Penefather, C. B., in reference to *Slatterie and Pooley* "laid down in that case is a most dangerous one; by it a man might be deprived of an estate of £10,000 a year, derived

* Nor., 144.

from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators who might be got to swear that they heard the defendant say that he had conveyed away his interest therein, or had mortgaged or had otherwise encumbered it: and thus by the facility so given the widest door would be opened to fraud."—*Lawless* v. *Queale*, 8 *Irish L. R.*, 382. This view has been adopted in the present Act: oral admissions as to the contents of a document are excluded under the present section: written admissions as to such matters are, as will be seen at Section 65 (*b*), admissible. This Section will not of course exclude admissions which the parties agree to make at the trial, Section 58: in which case it becomes unnecessary to prove the fact so admitted.

As to the mode of proving the contents of documents, see Sections 64, 65 and 91.]

Certain admissions not relevant in civil cases.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakíl from giving evidence of any matter of which he may be compelled to give evidence under section 126.

["Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*, are excluded on grounds of public policy. For without this protective rule, it would often be difficult to take any step towards an amicable compromise or adjustment, and as Lord Mansfield has observed, all men must be permitted to buy their peace, without prejudice to them should the offer not succeed."—*Tayl.*, § 720.

Whenever, accordingly, litigating parties have made and entertained overtures for a peaceful adjustment of the dispute, the Courts will no doubt be disposed to infer that the parties did not intend evidence to be given of the facts communicated in the course and on the faith of the pending negotiation.

"If a letter sent by an Attorney to the opposite party be expressed to be written "without prejudice," it cannot be received as an admission; neither can the reply be admitted, though not guarded in a similar manner."—*Tayl.*, § 702, *Paddock* v. *Forrester*, 3 *M. & Gr.*, 903. When a man offers to compromise a claim he does not thereby admit it, but simply agrees to pay so much to be rid of the action. Mr. Norton quotes a case in which a lawyer's clerk, sued for breach of promise of marriage, objected to the production of his love-letters on the ground that they were signed "Yours very affectionately, without prejudice." In order, however, to make good his contention under this section he would have to show that the understanding

between him and the lady as to their letters was that evidence of their contents should not be given.

Admissions made before an arbitrator, do not fall within the protection afforded by the section, but are receivable in a subsequent trial of the cause, the reference having proved ineffectual.—*Tayl.*, § 721.

The Explanation refers to the obligation on the part of Barristers and others to answer questions as to professional communications made to them in furtherance of a criminal purpose or as to any fact observed showing the commission of a crime or fraud since the commencement of their employment.]

Confession caused by inducement, threat or promise irrelevant.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

[The saying that "an accused person, confessing, is the best of witnesses" is not to be unreservedly accepted. The Text books abound in stories of persons who from terror, confusion, the hope of shielding others, weariness of life, a morbid and diseased state of mind or other cause, have recorded confessions which have subsequently proved to be untrue. Sometimes when there is a strong case against the accused, they imagine that acquittal is impossible and that their only chance of a light sentence is to make a penitential confession: sometimes, and notably in India, it is to be feared that a confession is wrung out of the accused by a resort to moral and physical torture on the part of the police.* The law accordingly scrutinizes all confessions with a jealous eye. "A confession," said Chief Baron Eyre, "forced from the mind by the flatteries of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it." In order, however, to exclude a confession, the threat, inducement or promise, which occasioned it must be of the character described in this section: it must emanate from a person in authority, such as a master or mistress, a Magistrate, constable or other official in charge of the accused: it must refer to *temporal* good to be gained or *temporal* evil to be avoided in reference to the proceedings,

* Torture for the purpose of eliciting the truth from prisoners, was not unknown in English Courts up to the commencement of the 17th century: but the punishment of the rack was formally pronounced illegal by the Judges in 1628.—*Tayl.*, § 809.

and therefore a confession obtained by spiritual exhortations is admissible: the advantage to be gained must have *reference to the proceedings against the accused*, so that a confession prompted by a promise of matters having nothing to do with the charge, such as that the prisoner should have some beer, or that he should see his wife, would not be excluded. The inducement held out need not be a real advantage. It is enough if the Court consider that the prisoner had grounds, which appeared to him reasonable, for supposing it to be so. Nor is it necessary that the inducement shall have proceeded directly from the person in authority to the accused: thus a threat made to a prisoner's wife might operate to exclude a subsequent confession, if it appears that the confession was occasioned by it.

Mere exhortations to tell the truth would not exclude subsequent confessions; though, of course, the accused might be urged "to tell the truth" in such a way as to give him clearly to understand that the best thing he could do would be to confess, and a confession so obtained would be within the scope of this section.

By Section 122 of the Code of Criminal Procedure no Magistrate is to record a confession unless upon inquiry he has reason to believe that it was made voluntarily, and he has to attach a memorandum to this effect to the confession.

Bentham places "the infirmative considerations applicable to the probative force" of confessions under the heads of (1) Misinterpretation, 2 Incompleteness, 3 Mendacity. Misinterpretation is where a wrong meaning is put by the witness on something said or done by the person supposed to have confessed, and when, accordingly, "that which really is not a confession might be taken and acted upon as such." It is possible that the confessing person may have expressed himself incorrectly and the witness not have gathered his real meaning. An instance of this is the case of an accused person, in whose presence a witness was examined and having been asked whether the accused was the man who committed the crime replied in the negative: whereupon the accused person exclaimed, "Thank God, here is a man who has not recognized me;" what he really meant was, "Here is a man who has recognized that it was not I." Incompleteness is when the loose and imperfect language of the confessor has failed to give a correct view of the whole matter confessed: Mendacity is when, from any of the various motives affecting human action, an intentionally false confession is made. To guard against false confessions Bentham lays down the following two rules:

"(1) One is that, to operate in its character of direct evidence, the confession cannot be too particular: in respect of all material circumstances, it should be as particular as by dint of interrogation, it can be made to be: why so? Because (supposing it false) the more particular it is, the more distinguishable facts it will exhibit, the truth of which (supposing them false) will be liable to be disproved by their incompatibility with any facts, the truth of which may have come to be established by other evidence.

(2) The other rule is that, in respect of all material facts (especially the act which constitutes the physical part of the offence) it ought to comprehend a particular designation of the circumstances of *time and place*. For what reason? For the reason already mentioned: to the end that in the event of its proving false, facts may

be found by which it may be proved to be so. "I killed such a man" says the confessionalist "on such a day at such a place." "Impossible," says the Judge, speaking from other evidence, "on that day neither you nor the deceased were at that place."—*Benth. Ratio. Evid., Vol.* vii.

Doubts have been felt as to whether, under the English Law, a prisoner can, as an ordinary rule, be convicted on a mere extra-judicial confession without corroborative evidence.—*Tayl.*, § 794. Under the present law no such doubt will arise. If the confession be legally obtained it will be relevant, and the Judge can, if he think it, under the circumstances, sufficient proof of the offence, convict upon it in the absence of any other evidence.

As to Confessions before a Court, see C. P. C., S. 324.

The fact of a confession being retracted before the trial does not affect its admissibilty. Even though retracted in the Sessions Court and uncorroborated, it may be ground for a conviction.—*R.* v. *Bhuttun Rajwan*, 13 *S. W. R., Cr. R.*, 49. The averment on the Magistrate's record that, the accused before making the confession was warned that it was optional with him to answer the questions put to him, it is not conclusive to show that the confession was not made under the influence of its previous treatment, or is not otherwise valueless.—*R.* v. *Kashniath Denkar*, 8 *Bomb. Cr. Cas.*, 126.

In England it has been held that, in a suit for dissolution of marriage on the ground of the wife's adultery, entries in her private diary, detailing Acts of adultery committed by her with the co-respondent are, if they amount to a distinct and unequivocal admission of adultery by the respondent, and are free from suspicion of collusion or other taint, grounds on which the Court may, in the absence of any corroborative evidence, proceed to give the injured party the relief sought for: but such evidence must be received with extreme caution.—*Robinson* v. *Robinson and Lane*, 29 *L. J., Pr. & M.*, 17.

In *Reg.* v. *Hick's*, 10 *Beng. H. C. R., App.* 1, Phear, J. refused to admit evidence of a confession made immediately after the prisoner had been threatened with a loaded rifle, although the threat was not for the purpose of extorting the confession but of suppressing a mutiny on board ship. This scarcely seems justified by the section.]

Confession made to a Police officer not to be used as evidence.

25. No confession made to a Police officer, shall be proved as against a person accused of any offence.

[See C. P. C., S. 121.

As to punishment for causing hurt for the purpose of extorting confession or information which may lead to the detection of an offence, see I. P. C., Secs. 330, 331.]

Confession made by accused while in custody of Police not to be used as evidence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

[By Section] 120 of C. P. C., no Police Officer or other person may endeavour to induce any accused person, whether under arrest or not, to make a disclosure or confession, but he is not to prevent its being made. See also the same provision in case of persons arrested under warrant, Section 184.

It is not necessary that the Magistrate should have jurisdiction to try the offence. C. P. C., S. 45.]

So much of statement or confession made by accused as relates to fact thereby discovered, may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Confession made after removal of impression caused by inducement, threat of promise relevant.

28. If such a confession as is referred to in section twenty-four is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the Court, been fully removed, it is relevant.

[Thus, when a Magistrate told a prisoner charged with murder, that if he was not the man who struck the fatal blow and would disclose all he knew respecting the matter, he would use his influence to protect him; but, on subsequently receiving a letter from the Secretary of State refusing mercy, he communicated its contents to the prisoner; it was held that a confession, which the prisoner afterwards made to the coroner, who had also duly cautioned him, was clearly voluntary, and as such it was admitted. So when the accused had been induced by promises of favour to make a confession, which was for that cause excluded, but some months afterwards, and after he had been solemnly warned by two Magistrates that he must expect death and prepare to meet it, he again fully acknowledged his guilt, this latter confession was received in evidence.—*Tayl.*, § 802.

So also when a child, charged with theft, was told by her mistress that if she did not tell all about it that night, the Constable would be sent for to take her to the Magistrate: the Constable was sent for and on her way to the Magistrate the child confessed to the Constable; her confession was held to be admissible, inasmuch as the inducement, *viz.* the promise that the Constable should not be sent for was at an end, since he *had* been sent for.—*R.* v. *Richards*, 5 *C. & P.*, 318.]

Confession otherwise relevant.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise

vant not to become irrelevant because of promise of secrecy, &c.

of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Illustrations.

(*a*) A and B are jointly tried for the murder of C. It is proved that A said,—"B and I murdered C." The Court may consider the effect of this confession as against B.

(*b*.) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—"A and I murdered C."

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

[The policy of this section has been much questioned, and Mr. Norton goes so far as to say that "the best 'consideration' which the Court can give to a confession within this section will probably be to hold that it will not act upon it against third parties."* If this means that a Court ought not, unless under circumstances altogether exceptional, to rely on the uncorroborated confession of a co-accused person, the caution is no doubt, a sound one. But if by "not acting on it" is meant that the confession is to be banished from the Judge's mind and is not to form one ingredient in the conclusion which he forms about the case, the intention of the section would be, it is submitted, altogether frustrated by the course recommended. The reasons for allowing the Judge to take into consideration confessions of this character have been discussed in the Introduction: they follow necessarily from the principle, enforced by Bentham and now generally accepted as the right one, of admitting everything for what it is worth, unless, from the circumstances of the case or the character of the Tribunal, some obvious danger or dis-

* Nor., 173.

advantage would arise from doing so. The exclusion of various pieces of evidence under English Law is owing to the circumstance that it has been considered, on the whole, dangerous to entrust the consideration of them to a Jury; indeed the whole Law of Evidence has been, as Sir H. Maine points out,* shaped with reference to a procedure under which one part of the case is decided by the Judge and one by the Jury. In India, where the functions of Judge and Jury are united in a single official, it is unnecessary to insist upon the exclusion of a class of statements, which, though generally in a high degree suspicious, may yet throw some light on the case and are occasionally of the utmost importance. The approver's evidence, admissible under Criminal Procedure Code, is infinitely more suspicious, because he has a distinct motive for speaking; yet it is thought on the whole better to have it than not. On the other hand it is easy to conceive circumstances in which a confession by a co-accused would be perfectly safe ground on which to base an inference. See Section 114, Illustration (*b*). The proper course is clearly for Courts to carry out the direction of the section, take the confession into consideration, not forgetting how very little it is, in the generality of cases, worth, but not refusing to assign to it such weight as it deserves.

In Criminal Proceeding, Mad. H. C., 24th January 1873, a conviction unsupported by other evidence than a confession 'considered' under this section was quashed as bad in law.

This section would not, in a divorce suit, apply to confessions of adultery by a respondent or co-respondent as against the other party, since such persons are not being "jointly tried for the same offence." The admission of a respondent will therefore remain inadmissible as against a co-respondent, as in England.—*Robinson* v. *Robinson and Lane*, 29 *L. J., P. & M.*, 17.]

Admissions not conclusive proof, but may estop.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

[As to estoppels, see *post*, Chapter VIII, Sections 115-117.]

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circum-

* Fortnightly Review, Jan. 1873.

stances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

When it relates to cause of death;

(1.) When the statement is made by a person, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.(1)

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

or is made in course of business;

(2.) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.(2)

or against interest of maker;

(3.) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.(3)

or gives opinion as to public right or custom or matters of general interest;

(4.) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest,(4) of the existence of which, if it existed, he would have been likely to be

aware,(5) and when such statement was made before any controversy as to such right, custom or matter had arisen.(6)

or relates to existence of relationship;

(5.) When the statement relates to the existence of any relationship [*by blood, marriage or adoption] between persons as to whose relationship the person making the statement had special means of knowledge,(7) and when the statement was made before the question in dispute was raised.(8)

or is made in will or deed of deceased person;

(6.) When the statement relates to the existence of any relationship [*by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree,(9) or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.(10)

or relates to transaction mentioned in section 13, clause *(a)*;

(7.) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section thirteen, clause *(a)*.(11)

or is made by several persons, and expresses feelings relevant to matter in question.

(8.) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.(12)

Illustrations.

(*a*.) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B: or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

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* Added by Act XVIII of 1872.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(*b.*) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(*c.*) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(*d.*) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e.*) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(*f.*) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(*g.*) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(*h.*) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(*i.*) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(*j.*) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased bánya in the ordinary course of his business, is a relevant fact.

(*k.*) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(*l.*) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(*m.*) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A at a given date, is a relevant fact.

(*n.*) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the cari-

cature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

[(1) This is an important extension of the former law, according to which it was essential, in order to let in a dying declaration, that the declarant *should have been and should have thought himself to be in danger of approaching death.* According to English Law, moreover, such statements are admissible only in cases of homicide, "when the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration." Thus, on a trial for robbery, the dying declaration of the party robbed has been rejected; and where a person was indicted for administering drugs to a woman with intent to procure abortion, her statements in extremis were held to be inadmissible.—*Tayl.*, §§ 644—5. Under the present section such statements are admissible 'whatever be the nature of the proceeding,' as in a trial for procuring abortion, or in a civil action for unskilful surgery: and the statement is admissible whether it is as to the cause of death, *or as to any of the circumstances of the transactions* which resulted in the person's death: it must, however, be in a case in which the cause of the person's death comes into question.

Such a statement would generally, it is apprehended, be relevant, under Section 14, whether the person making it were dead or not. But the statement must be more than a mere expression of assent to another person's statement;

"Where a statement, ready written, was brought by the father of the deceased to a Magistrate who accordingly went to the deceased and interrogated her to its accuracy, paragraph by paragraph, it was rejected in Ireland by Mr. Justice Crampton, who observed that, "in a state of langour in which dying persons generally are, their assent could be easily got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true."—*Tayl.*, § 650.

The English ruling, *R.* v. *Pike*, 3 *C. & P.*, according to which the dying declaration of a child of such tender years that she could not understand the doctrine of a future state, was rejected, is not applicable under the present section; nor, it is submitted, is the question of the competence of the person to bear testimony one which affects the admissibility of the statement. If it complies with the requirements of this section it is relevant, though, possibly, of small importance.

But dying declarations, other than those now provided for, are inadmissible, unless they can be shown to be relevant under some other section. Thus where a man was tried on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who on his death bed confessed that he had committed the crime. Such a statement, moreover, might probably be shown to fall within the scope of Clause (3) of the present section.

(2) The most familiar English case on this subject is that of *Price* v. *The Earl of Torrington* (1 *Smith, L. C.*, 139), in which the plaintiff, a brewer, brought an action against the defendant for beer sold and delivered. The evidence against the defendant was, that the usual way of the plaintiff's dealing was, that the draymen or

carters, came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names; and that the drayman who had delivered the beer in question was dead; but the book was produced and bore his signature. This was held good evidence of delivery of the beer.

If the entry was made in the course of business no question as to the source of information, on which the entry was based, will affect its admissibility. According to English Law such an entry must be based on the *personal knowledge* of the person making it.

"Thus in an action for the price of coals, which had been sold at the pit's mouth, an entry was rejected, which appeared to have been made in the following manner. In the ordinary course of business, it was the duty of one of the workmen at the pit, named Harvey, to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ a man named Baldwin to make entries in the books from his dictation. Baldwin read over these entries every evening to the foreman. At the time of the trial, Harvey and the foreman were dead, and Baldwin was called to produce this book, with the view of proving thereby the delivery of the coal in question; but the Court held that it was inadmissible. The ground of this decision appears to have been, that, although the entries, being made under the foreman's direction, might be regarded as made by him, yet, inasmuch as he had no personal knowledge of the facts stated in them, but derived his information at second-hand from the workman, there was not the same guarantee for the truth of the entries as might be found in *Price* v. *Torrington*, *Doe* v. *Turford*, and *Poole* v. *Dicas*; in all of which cases the party making the entry had himself done the business, a memorandum of which he had inserted in his book."—*Tayl.*, § 632.

Under the present section, it is not necessary that the person making the entry should have a personal knowledge of the fact recorded; it would be sufficient to show that the entry was made in the ordinary course, and that the question as to how the person making the entry came to know about the matter, though it might affect the weight to be given to the entry, would not affect its admissibility.

According to English Law entries made in the course of business must be shown to have been contemporaneous; this is not required by the present section, though of course such entries would ordinarily be so.

As to the admissibility and effect of entries in books of account and official records, whether the maker is dead or not, see *post*, Sections 34 and 35.

Mr. Norton* observes with reference to this clause of the section, "The principal points to bear in mind are the following. Though the Act is silent as to them, Courts will probably act prudently in abiding by the English decisions when the points arise." The points thus referred to are

(i) the necessity that the entry should be by a person having personal knowledge;

(ii) that it should be contemporaneous;

* Nor., 182.

(iii) that it should not be an entry of any collateral fact over and above what it was the strict duty of the person entering it to record.

As to these it is necessary to observe that, as these restrictions have been advisedly omitted by the Legislature, Courts will, so far from "acting prudently," be committing an illegality if they exclude evidence on grounds not countenanced by the law. Any evidence which falls within the terms of the present section is admissible.

(3) Illustrations (*e*) and (*f*) are specimens of admissions against interest; in (*e*) because the agent admitted to A that he held moneys, for which he was bound to account to him, in (*f*) because the clergyman's statement would have exposed him to a criminal prosecution. The English case of *Ivat* v. *Finch*, *Taunt*, 141, exemplifies the same rule. This was an action of trespass for taking three mares, the property of the plaintiff. The defendant, who was lord of the manor, justified under a heriot custom; and the sole question between the parties was, whether one Alice Watson, the tenant, was possessed of the mares at the time of her death. The plaintiff contended that she had given them to him some time before, and tendered in evidence her declarations to that effect. Her declaration was admitted by the appellate court as having been against her interest.—*Tayl.*, § 717.

The English Courts have differed as to whether an entry by a person, acknowledging the payment of money to himself can be regarded as against his interest, when the entry is the only evidence of the charge of which it shows the subsequent liquidation. Thus it was questioned whether a receipt by a Carpenter of money paid for repairs would be considered as against his interest when the Bill was the only evidence of the demand. This refinement is met by the provision of clause (2) that a memorandum of receipt given as the course of business is always admissible.

A statement charging a person with the receipt of money does not cease to be against his interest although it forms part of a general debtor and creditor account, the balance of which is in favor of the receiver.—*Rowe* v. *Brenton*, 3 *M. & R.*, 267.

An entry of moneys received for a third person need not show for whom they were received, if it can be proved *aliunde* that they were received for a third person.—*Ibid.*

The provision rendering relevant any statement, which would have exposed a man to criminal prosecution, is a departure from the English Law. The admissibility of such statements was discussed in the "Sussex Peerage case," and it was ruled by Lord Lyndhurst that they were inadmissible.—11 *Cl. and Finl.*, 110.

In the English Courts a distinction is made as to the effects of entries in the course of business, and statements against interest: the latter are admitted as proof of independent matters, which, though forming part of the entry, are not in themselves against the interest of the declarant, as *e. g.*, an entry by an accoucheur of payment for delivering a child is admissible to prove the date of the child's birth: but with regard to entries in the course of business it has been held that "whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be

thought to find a place in the narrative, is no proof of those circumstances."—*Chambers* v. *Bernascori*, 1 *C. M. & R.*, 368. This distinction would appear not to be retained in the present section: anything contained in a statement which could be shown to have been made in the ordinary course of business would, it is conceived, be admissible in the same way as anything contained in a statement against interest.

In order that a statement should be deemed to have been "*made*" by a person it will not, it is apprehended, be necessary to show that it was actually written by him, if it can be, shown to have been written under his direction, or to have been superintended and adopted by him. The English law on the subject is thus described by Mr. Taylor:—

"To render accounts admissible as the declarations of a deceased person charging himself, it is not necessary that they should be in his handwriting, and should bear his signature; but they will be received in evidence, if they were written by him either wholly, or in part, though they were not signed or if they were signed by him though they were written by a stranger. Neither can any objection be raised to their admission, though they were neither written nor signed by the deceased, if either direct proof can be furnished that they were written by his authorised agent, or if that fact can be indirectly established, as for instance, by showing that the deceased subsequently adopted the accounts as his own and delivered them in at an audit; nor does it signify in such a case, whether the party who actually wrote the accounts be alive or dead at the time of the trial, though in the former event, his non-production may be matter of observation to the Jury. But if no proof can be given that the account was either written, or signed, or authorised, or adopted, by the deceased person made chargeable thereby, it cannot be received."—*Tayl.*, § 615.

(4) The term "interest" here does not mean that which is interesting from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest, by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, "because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence therefore ought not to be required; because in local matters in which the community are interested all persons living in the neighbourhood are likely to be conversant; because common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statement were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise."—*Lord Campbell in R.* v. *Inhabitants of Bedfordshire*, *Tayl.*, § 544.

(5) This does away with a distinction known to English Law between matters of *public* interest, *i. e.*, affecting the entire community, and matters of *general* interest affecting only some section of it.

In the former case evidence of reportation might be received *from any one*, in the latter some connection with the place or subject has to be proved. By the present law it will be necessary in every case alike to show that the circumstances of the person, whose statement is to be proved, were such that (not that he had but that) he would have been likely to have competent knowledge of the right, custom or matter, if it existed.

(6) In order that a statement should be admissible under this clause, it must have been made before any controversy as to the matter had arisen. The same provision is made, though in slightly different terms, as to statements admissible under Clauses (5) and (6). This is in accordance with the rule of English Law. "No man," says Taylor, "can be presumed to be indifferent in regard to matters in actual controversy: for when the contest has begun, people generally take part on the one side or the other: their minds are in a state of ferment, and, if they are disposed to speak the truth are seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result all *exparte* decisions, even those upon oath, are excluded, if they can be referred to a date subsequent to the beginning of the controversy.—*Tayl.*, § 563. The controversy, however, must have been *as to the right, custom or matter* under inquiry; and therefore the mere fact of a controversy between the parties, if was not regarding the matter in question, will not operate to exclude the statement. Nor will such a statement be inadmissible on the ground that it was made with a view to avoid future controversy: or with the direct intention of supporting the declarant's title, or because the declarant stood, or believed that he stood, in the same legal position as the person by whom the statement is adduced. —*Tayl.*, § 566.

(7) According to English law a certain degree of relationship is necessary in order to make such statements admissible, and statements of illegitimate children, accordingly, have been rejected. Under the present section the existence of *any special means of knowledge* on the part of the person making the statement will render it admissible.

(8) See Note (6).

(9) There is a question in the English Courts how far a pedigree, purporting to have been compiled, either wholly or in part, from registers and other documents, *which are not shown to have been lost*, is admissible. In the case of *Davies* v. *Lowndes*, a Welsh pedigree, proved to be in the handwriting of one of the ancestors of the plaintiff, was produced from proper custody, but had at its close a memorandum to the following effect "collected from Parish Registers, Wills, Monumental Inscriptions, Family Records, &c." This was tendered as evidence of the relationship of persons living at the time when the document was framed but was rejected by the Court of Common Pleas on the ground that it bore on its face a certificate that it was only secondary evidence of existing originals, the absence of which was not accounted for. It was afterwards however decided by the Exchequer Chamber that the document was admissible, so far, at any rate, as it recorded facts which the maker might be presumed to have learnt from his personal knowledge of the persons therein described as relations, or from information received by him from some deceased

members of what the latter knew, or heard from other members who lived before his time.—*Davies* v. *Lowndes*, 7 *Scott, N. R.*, 211. It is apprehended that under the present section, if the document could be deemed "a family pedigree," any statement in it would be admissible, notwithstanding any memorandum as to the sources from which it was compiled. As to evidence, admissible for the purpose of contradicting or corroborating a statement admissible under this section, or of impeaching or confirming the credit of the person making it, see *post*, Section 158.

(10) See Note (6).

(11) There are transactions by which a right or custom in question was created, claimed, modified, recognized, asserted or denied, or which are inconsistent with the existence of any such right or custom. The effect of this clause is that a recital or other statement of a relevant fact, contained in any document admissible under Section 13, would be itself relevant, if the party making the statement were dead or non-producible.

(12) Illustration (*n*) gives an instance of the sort of cases for which this clause is intended to provide. The object often is to ascertain not so much the feelings or impressions of individuals as the general feeling or impression of a crowd or other public body. This is to be gathered from the expressions used by individuals forming the crowd, and evidence of such expressions is admissible, though it is often impossible to call the individuals themselves as witnesses.]

Evidence in a former judicial proceeding when relevant.

33. Evidence given by a witness in a judicial proceeding,[1] or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :[2]

Provided

that the proceeding was between the same parties[3] or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same[4] in the first as in the second proceeding.

Explanation.—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

[(1) This section applies only where a witness is absent: when he is present, his evidence in a former judicial proceeding may always be used to corroborate or contradict him. See *post*, Sections 155, Clause (3), and 157: and, if the witness be a party to the suit, his statements in former judicial proceedings will often be relevant against him as admission. The proceeding must have been a judicial one. Mr. Norton, in observing, that 'it is not necessary that the evidence should be given in a judicial proceeding'* appears to have over-looked the wording of the section. Such an extensive meaning, however, is given to the phrase "judicial proceeding" that but few statements can be excluded. See Cr. P. C., Section 4.

A statement contained in an affidavit, relative to a pending suit, would, clearly, be made in a judicial proceediug.

(2) The provisions of the section are less strict than the English Law, which will not, in criminal cases, admit a former deposition of a witness on mere proof that he cannot be found after diligent search, *Tayl.*, § 442; nor even if it be shown that, being a foreigner, he has left the country without any intention to defeat justice. Under the present section, if either the witness cannot be found, or cannot be produced without unreasonable delay or expense, his deposition will, subject to the provisoes of the section, be admissible.

(3) The same parties, *i. e.*, the same in interest not in mere form; the parties need not be absolutely identical; the plaintiff in the one case may be the defendant in the other; and there may have been a plurality of parties in the one case and not in the other; as *e. g.*, evidence given in a suit brought by A and others against B would be admissible in a subsequent suit brought by B against A alone the subject-matter of both suits being substantially the same.—*Wright* v. *Tatham*, 1 *A. and E.*, 3.

(4) Thus if in a dispute respecting lands any fact were to come directly in issue, the evidence will be admissible between the same parties or their representatives to prove the same point in a dispute about other lands.—*Doe* v. *Foster*, 1 *A. and E.*, 791.

As to the mode of contradicting or corroborating statements relevant under this section, or of impeaching or confirming the credit of the person by whom the statement was made, see *post*, Section 158.

There is one important class of cases in which statements in a previous judicial proceeding are admissible without these conditions. By Section 249 of the C. P. C., it is provided that in trials before a High Court or Court of Session the evidence of a witness made at the enquiry before the Committing Magistrate may be referred to by the Court, and the judgment may be grounded upon it, although the witness at the trial makes statements inconsistent therewith.

When British subjects are being tried under Section 9 of the Foreign Jurisdiction and Extradition Act, XI of 1872, copies of depositions made or exhibits produced before the Political Agent of

* Nor., 202.

the State, in which the offence is alleged to have been committed, may be received in certain cases, Section 10; and so in enquiries ordered by Government under Section 14.]

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

Entries in books of account when relevant.

34. Entries in books of account,[1] regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.[2]

Illustration.

A sues B for Rupees 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

[(1) Under the English Common Law a party cannot prove, in his own behalf, an entry in his books made by himself. The present section is a reproduction of the Roman Law, under which the production of a merchant's or tradesman's book of accounts, regularly and fairly kept in the usual manner was deemed presumptive evidence *(semi-plena probatio)* of the justice of his claim; and in such cases, the supplementory oath of the party *(juramentum suppletivum)* was admitted to make up the *plena probatio* necessary to a decree in his favour.—*Tayl.*, § 642. A party may, under this section, corroborate other evidence of a debt being due to him by entries, whether by himself or another, in his own books, provided the books have been regularly kept in the course of business.

When a Company under Act X of 1866 is being wound up, the books, accounts and documents of the Company and the liquidators are, as between the contributories, *primâ facie* evidence of all things purporting to be recorded therein. Act X of 1866, Section 170.

(2) This is in accordance with the doctrine laid down in *Rai Sri Kishen* v. *Rai Hari Kishen*, 5 *M. I. A.*, 432, where it was held that "the production of a banker's books with the entries of the items constituting the demand, kept according to the established custom of Mahajans in India, is not *of itself* sufficient evidence to establish such a claim." Backed, however, by the statements of the creditor or other credible testimony, they would be sufficient, as for instance, in *Devarka Dass* v. *Baboo Jankee Dass*, 6 *M. I. A.*, 88, where the admission of the correctness by the Defendant was held sufficient evidence to dispense with other evidence, independent of the Plaintiff's Account Books, as to the existence of a debt.]

Entry in public record, made in performance of duty enjoined by

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his

law, when relevant.

official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

[Under this section entries made by Settlement officers and Village Officials in the Record of Rights: records by a Registrar of Births, Deaths and Marriages: minutes, &c., of meetings where such minutes are directed by law to be kept, and other like documents are relevant when the matters to which they refer are in dispute.

As to the weight to be given to ish-navisi papers as against satisfactory oral evidence of uninterrupted possession, see *William Furguesson* v. *Dwarhansthe Singh and another*, 8 *B. L. R., P. C.*, 505.

By Section 61 of the Indian Companies' Act, 1866, a copy of the report of Inspectors, appointed under the Act, authenticated by the seal of the Company, is admissible as evidence of their opinion.

Such entries are frequently conclusive proof of the facts recorded. Thus the certificate of a district court granted under Section 4 of Act XXVII of 1860 is conclusive proof of the representative title of the person to whom it is granted: and a certificate, granted under Part VI of the Indian Christian Marriage Act, 1872, is conclusive proof of the Marriage having been performed.]

Maps and plans when relevant.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

[As to the presumption in case of Maps, see Section 83.]

Statement as to fact of public nature contained in any Act or Notification of Government, when relevant.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the Govern-

ment Gazette of any colony or possession of the Queen, is a relevant fact.

[By Section 8 of Act I of 1867 (M), a recital in any Act of the Governor in Conncil is *primâ facie* evidence of the fact recited. The necessity for this provision is removed by Section 114 which would justify a Court in presuming the truth of any fact recited in an Act either of the Supreme or Local Councils.

As to the effect of a notification of a cession of territory, see *post*, Section 113.]

Statements in law books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

[As to other modes of proving the law of a country, see Section 45 and note thereon. As to the presumption in the case of such books, see Section 84.]

How much of a Statement is to be proved.

What evidence to be given when statement forms part of a conversation, document, book, or series of letters of papers.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers, as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

[The old rule of Common law was that when one party had put in an extract from a document, or asked a question as to a particular statement in a conversation, the other party was entitled to have the whole document read, or to prove anything else that was said in the same conversation.

The inconvenience and injustice, however, in which such a practice would have resulted, led to the rule being greatly narrowed by the Courts in its application: and the English Law is now to the same effect as the present section. It is easy to see the necessity for the rule of admitting only such other portions of any statement, conversation, document, &c., as are necessary to explain the statement proved: if it were not for such a rule the mere fact of a witness being asked a question about a conversation might be made the pretext for getting in various statements which obviously ought not to be admissible. Take for instance a case in which the plaintiff sued the defendant for having maliciously arrested him for debt, the plaintiff contending that the advance had been a gift and not a loan; a witness for the plaintiff acknowledged on cross-examination, that he had heard the plaintiff admit on oath, that he had repeatedly been insolvent, and had been remanded by the Court; whereupon he was asked in re-examination whether the plaintiff had not, on the same occasion, expressly stated that the money was given, and not lent. It is obvious, that, though both these statements were made in the course of the same conversation, the one was in no way necessary to explain the other; and that the plaintiff's statement that the advance was a gift and not a loan, being an admission, could not properly be proved by him or on his behalf. See Section 21.—*Prince* v. *Samo*, 7 *A. & E.*, 627.

With regard to letters, it has been held that a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production: because, in such case, the letters, to which those put in were answers, are in the adversary's hands, and he may produce them, if he thinks them necessary to explain the transaction.—*Tayl.*, § 663.]

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT.

Previous judgments relevant to bar a second suit or trial.

40. The existence of any judgment, order or decree, which by law prevents any Court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

[This section is framed with reference to the provisions of Section 2 of the Code of Civil Procedure, under which the Courts are debarred from taking cognizance of any suit, brought on a cause of action which has already been disposed of by a competent Court between the same parties or those under whom they claim; and to the corresponding enactment in the Code of Criminal Procedure, Section 460, that a previous conviction or acquittal shall be a bar to any further proceedings in respect of the same offence. So also the order of an Insolvency Court might be a bar to an ordinary civil suit; or an order for winding up a Company under Act X of 1866 might be pleaded under Section 108, or 167 to any proceedings against the Company. Whenever any

such plea is to be urged, the judgment, order or decree, on which it is grounded, becomes relevant.

The extent, to which Section 2 of the C. P. C. operates to bar subsequent proceedings, has been much discussed in the Courts, and its provisions will, it may be hoped, be simplified, elucidated, and rendered more complete in the Bill now in preparation to amend the Code of Civil Procedure. Pending the passing of that Bill it was considered undesirable to deal further with the subject, or to supplement the defects of Section 2 by provisions as to matters, which that section would continue mainly to regulate, and which would, accordingly, be more conveniently considered when it was under amendment. See note at p. 21 of the Introduction. Meanwhile the operation of section two is, generally, as follows. Taken along with the provision in section seven that "every suit shall include *the whole of the claim arising out of the cause of action*," it frequently has the effect barring proceedings as to matters other than those actually litigated on the former occasion. The English Law on the subject has been thus summarized:—

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter directly in question in another Court; secondly, that a judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."—*Duchess of Kingston's Case*, 2 *Sm. L. C.*, 680.

But facts, which are essential to or assumed by a former judgment, may, it appears, be contested in a subsequent suit between the same parties, so long as the actual cause of action decided in the former decree be not re-contested. "It is, I think, to be collected," said Knight Bruce, V. C.,

"that the rule against re-agitating matter adjudicated is subject generally to this restriction, that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not at all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object. This limitation of the rule appears, generally speaking to be consistent with reason and convenience, and not opposed to authority."—*Barrs* v. *Jackson*, 1 *Yo. and Col.*, 597.

It is, moreover, necessary, in order to bar subsequent proceedings, not only that there should have been a suit as to the same cause of action between the same parties, but that it should have been *heard and determined*. There must have been a decision on the merits.

"To conclude a plaintiff by a plea of '*res judicata*,' it is not sufficient to show that there was a former suit between the same parties for the

same matter upon the same cause of action. It is necessary also to show that there was a decision, finally granting or withholding the relief sought. Res Judicata dicitur quæ finem contraversiarum pronuntitione Judicis accepit, quod vel condemnatione vel absolutione contingit;" and, therefore, where a suit had been dismissed as premature on the ground that a question as to mesne profits, which formed part of the claim, was still pending in an inquiry ordered by the High Court, it was held that the matter was not res judicata.—*Saikappa Chetti* v. *Rani Kalandapun Nachyar*, 3 *M. H. C. R.*, 84.

To give effect to the plea of *res judicata*, the court must be satisfied that the ground of legal right, on which the plaintiff sues, was a point raised and opened for decision in the former suit, and that it was finally dealt with by the judgment and decree therein."—*Udayia Taver and Katama Nachyar and another*, 1 *M. H. C. R.*, 321.

But a point which did fairly form a portion of a former cause of action will not be allowed to be raised in a subsequent action merely because the plaintiff failed to raise it in the first action. "A party is bound to bring forward his whole case in respect of the matter in litigation, and open to him upon the points for decision in the suit. He cannot abstain from relying upon, nor abandon a ground of claim, which is in question and proper for consideration and decision in the suit, and afterwards make it a cause of a fresh suit in respect of the same subject-matter."—*Ibid.*

A former judgment by a Court of competent jurisdiction, upon the same cause of action, is conclusive between the same parties in a subsequent suit brought in another Court, notwithstanding the pendency of an appeal against it: but the Judge passing the decree in the subsequent suit may, on application made to him, and security being given, stay the execution of it, until the appeal in the former suit is decided; and may, if the former decree is reversed, entertain an application for review of his own decision in the subsequent suit.—*Bulkiram Nathuram* v. *The Guzerat Mercantile Association, Limited*, 4 *Bom. H. R.* (*A. C.*), 81.

If the parties are not the same or the representatives of the same, the rule will not apply. Thus, where plaintiff sued to raise an attachment placed on a certain house, but failed, and the decision of the lower Court was confirmed in appeal: the house was then sold; Plaintiff sued the purchaser for possession. It was held that he was not precluded by the existing decree from bringing his suit against the purchaser inasmuch as the judgment was not a judgment *in rem*, neither was the purchaser a party to it.—5 *Bomb. H. C.*, 201.

A judgment recovered against one or more of several joint wrongdoers or joint contractors, even without execution, will be a bar to a suit against another or others of them. "If there be a breach of contract or wrong done, or any other cause of action, by one against the other, and judgment be recovered in a Court of Record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim *transit in rem judicatam*. The cause of action is changed into

matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. And this appears to be equally true where there is but one cause of action, whether it be against a single person or many; the judgment of a Court of Record changes the nature of that cause of action and prevents its being the subject of another suit; and the cause of action being single, cannot afterwards be divided into two."—*King* v. *Hoare*, 13 *M. & W.*, 494. The doctrine laid down in *R.* v. *Hoare* was considered and affirmed in *Brinsmead* v. *Harrison*, *L. R.*, 6 *C. P.*, 586, but it was further held that judgment recovered in trover without satisfaction did not have the effect of vesting the property in the goods in the defendant. In order to pass the property, the decree must have been executed.

No express provision is made in Section 2 of the Civil Procedure Code for the effect of foreign judgments. It has been held that a judgment recovered in the Court of an Independent Sovereign, and not impeachable on the ground of fraud or want of jurisdiction or impropriety of procedure, is a bar to a second suit in a British Court. —*Moadao Beebee* v. *Ram Maniko Dey*, 6 *Suth. W. R.*, *Civ. Ref.*, 31.

In England the Master of the Rolls has expressed his opinion that a foreign judgment, sought to be enforced in another country, is examinable for the following purposes only: 1st, for the purpose of showing that the defendant abroad had no notice of the suit: 2nd, that it was obtained by fraud: 3rd, that the Court, which pronounced it, had no jurisdiction: 4th, that there was error on the face of the judgment, *i. e.*, error sufficient to show that the Court had come to an erroneous conclusion of law or fact: 5th, that it was contrary to the law which it professed to administer.—*Reimer* v. *Druce*, 23 *Beav.*, 145. The matter must, however, be regarded as amongst those for which at present no express provision is made by the law of this country.

As to the mode in which judgments, &c., are to be proved, see Sections 76 and 77. As to the presumption raised in the case of any record or memorandum of evidence, see Section 80, and, in the case of a judicial record of a foreign country, Section 86.]

Judgments in probate, &c., jurisdiction.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, Admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order, or decree is conclusive proof

that any legal character which it confers accrued at the time when such judgment, order, or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment [*order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment [*order or decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment [*order or decree] declares that it had been or should be his property.

[Provision is here made for the much debated subject of the "*Judgment in rem*," a phrase which has been used in English Courts, (not always with a very accurate appreciation of its history and meaning,) to denote certain judgments which are conclusive, not only as against the parties to them, but as against all the world. As to the matters about which such judgments could be pronounced, and the Courts who were competent to pronounce them, the Judgments of the Courts have exhibited some hesitation and contrariety of opinion. Some judgments, declaratory of status, have been regarded as judgments *in rem* and conclusive as against all the world, irrespective of the character of the proceedings in which they were obtained and the tribunal by which they were delivered. For instance decisions of the ordinary Courts on questions of legitimacy and adoption have been on some occasions held to be 'judgments *in rem*' and universally conclusive. (See Norton's Leading Cases, Vol. I, 107.) Also *Kunhya Lal* v. *Radha Chund*: vii, *Suth., W. R.*, 338: while in other cases this effect has been denied to them.

The history and theory of the judgment *in rem* was discussed and elucidated by Holloway, J. in the case of *Yarakalamma* v. *Annakala Naramma*, 1 *M. H. C. R.*, 276. "The results," he says, "seem to be that the rule, which makes a judgment conclusive only, "against the parties and those who claim under them, is subject to "certain exceptions, which are the offspring of positive law, and that "the reasons for the exception may be generally stated to be, both "in English and Roman Law, that the nature of the proceedings, "by which there is a fictitious (though not generally unjust

* These words are added by Act XVIII of 1872.

" extension of parties) renders it proper to use the judgment against " those not formally parties." Under the present Act the only judgments, to which all the world is thus supposed to be a party, and which are universally conclusive, will be those passed by the Courts and on the subjects specified in the section. Judgments, declaratory of status, passed by a Court exercising any other jurisdiction, such as ordinary decrees declaratory of adoption or legitimacy, will not be operative except against the parties to the judgment and their representatives, as provided by Section 40.

So far as regards the effects of a grant of probate of Hindu Wills, this is an alteration of the law, as previously laid down by the Courts. In *Sharo Bibi* v. *Baldeo Das*, 1 *B. L. R., O. J.*, 24, Norman, J., ruled that grant of probate of a Will in the case of Hindus conferred no title on an executor, but that he derives his title from the Will itself, and that probate was evidence of his title only so far as a decree of the Court granting it would be, *viz.*, between the parties and those going to the suit in which the decree was made. Probate is now evidence of the executor's title against all the world ; but it must be remembered that a Hindu executor has not necessarily the same powers as one under English Law, and that he is not empowered to alienate except as directed by the Will or as necessitated by the case.—*Srimate Jaykali Bibi* v. *Shibnath Chatterjee*, 2 *B. L. R., O. J.*, 1.

It must be remembered, moreover, that by Sections 187 and 190 of the Indian Succession Act, 1865, no right as executor or legatee under a Will or to any part of the property of an intestate can be established in any Court of Justice unless a Court of competent jurisdiction *within the Province*, has granted probate or letters of Administration. The holder of a power of attorney, therefore, from a person who has obtained probate *without the province* would not be entitled to realize assets of the estate.]

Judgments relating to public matters.

42. Judgments, orders, or decrees other than those mentioned in section forty-one are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders, or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

[This corresponds with the English Law on the point. Such judgments are, in fact, admissible as evidence of reputation on the matters in dispute.—*Tayl.*, § 1496. Of course if they fall within the scope of Section forty, they are conclusive.]

What judgments, &c., not relevant.

43. Judgments, orders, or decrees, other than those mentioned in sections forty, forty-one, and forty-two,[1] are irrelevant, unless the existence of such judgment, order, or decree, is a fact in issue, or is relevant under some other provision of this Act.[2]

Illustrations.

(*a.*) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification.

The fact is irrelevant as between B and C.

(*b.*) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's life-time. C says that she never was B's wife.[3]

The judgment against B is irrelevant as against C.

(*c.*) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(*d.*) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

[(1) By Section 138 of the Civil Procedure Code a Civil Court may, of its own accord or on application of any of the parties, send for the record of any other suit or case or any other official papers and inspect the same when the inspection of such record or papers appears likely to elucidate the facts of the case and promote the ends of Justice.

Though a Court might inspect any such document under the circumstances named, it could not of course make use of it or of any fact contained in it for the purposes of the judgment, except such fact were relevant under the provisions of this Chapter.

In R. A. No. 116 of 1870, 6 M. H. C. R., 425, the Judges considered the doctrine, laid down in the English Courts "that a conviction by a Magistrate, who has jurisdiction over the subject-matter is, if no defects appear on the face of it, conclusive evidence of the facts stated in it.—*Brittain* v. *Kinnaird*, 1 *R. & B.*, 482. This point, which is now provided for in England by express enactment, 11 & 12 Vic., c. 44, S. 2, might be of great importance in proceedings against Magistrates governed by Act XVIII of 1850. Scotland, C. J., however, considered that the English rulings had not established the absolute conclusive-

ness of the findings in a Magistrate's conviction or order, and that at any rate the doctrine had never been enforced in this country. Under the present Act there can, it would seem, be no question that a Magistrate's order, unreversed, would not be conclusive of the facts stated therein as against a party suing him in respect of such order.

(2) An example of this is given in Illustration (*d*). So also a judgment may be relevant for proving a previous conviction against a witness and so discrediting him. See *post*, S. 153.]

By Section 54 (*post*) the fact that an accused person has been previously convicted is relevant in a criminal proceeding. As to the mode in which the previous conviction is, in such cases, to be proved, see C. Cr. Pr., 326.

(3) This appears to be a clerical error. It should be "C says that she never was A's wife."]

Fraud, collusion and incompetency of Court may be proved.

44. Any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under section forty, forty-one, or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

[This is somewhat wider than the English Law. In England *a stranger*, against whom a judgment is offered in evidence, may always avoid it by showing that it was obtained by fraud or collusion. Whether an innocent party to the Judgment may prove in another Court that it was obtained by fraud is not equally clear, as it would be in his power to apply directly to the Court, which pronounced the judgment, to vacate it; but a *guilty* party would certainly not be allowed to defeat a judgment by showing that he had practised an imposition on the Court.—*Tayl.*, § 1522.

This point does not appear to be provided for in the present section; the contingency, however, of a party to a judgment endeavoring to avoid it by showing his own fraud is a somewhat remote one.]

OPINIONS OF THIRD PERSONS WHEN RELEVANT.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law,(1) or of science or art,(2) or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art, [*or in questions as to identity of handwriting] are relevant facts.(3)

Such persons are called experts.

* Added by Act XVIII of 1872.

Illustrations.

(*a.*) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b.*) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c.*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

[(1) "Foreign law" would, it is apprehended, include usages and customs of a foreign country having the force of law. In England it has been doubted whether on a point of Foreign Law the Court was at liberty itself to consult foreign law books, except so far as they have been introduced by counsel in their argument; foreign laws and customs must, it is considered, be proved by calling an official or professional person to give an opinion about them: nor in England can the law of a foreign country be proved even by a jurisconsult, if he has acquired his knowledge of it solely from study at an university in another country. Such a person's opinion would under the present Act be relevant as that of one specially skilled in the matter. But it would not be essential to call him, as by Section 38 statements of law in law books and reports are relevant; by Section 56 the Court may refer to any such book for information, and by Section 84 is to presume any such book to be genuine.

(2) "Science or Art" must be taken to include any branch of learning, or any application of means to an end, which requires a course of previous habit or study in order to obtain a competent knowledge of its nature. The expression would embrace special trades and professions, *e. g.*, commercial men may be called to explain particular expressions in a letter on a commercial subject. So also the genuineness of a Postmark may be proved by the opinion of a Clerk of the Post Office: so also the opinion of Military Officers on a question of Military practice: of naturalists as to the power of fish to overcome obstacles in a stream; of engineers as to the effect of an embankment such as the one in question in choking up a harbour, of a person, whose business it had frequently been to estimate damages caused by the laying out of Railways, as to the effect of laying out a Railway within a certain distance of a building on its rental. It may sometimes be difficult to say whether a matter involves "a point of science or art," and, consequently, whether the opinions of experts upon it are relevant. There are conflicting decisions, for instance, in the English Courts, as to whether the opinion

of brokers as to what is a material concealment in effecting a policy, or what is the duty of a broker under particular circumstances, can be regarded as the opinion of experts. The test, under the present section, would seem to be whether the point to be decided involves special acquaintance with a particular subject, or whether it is a mere question of legal or moral obligation about which one person is as good a judge as another. Thus a skilled witness may be asked whether by the Rules of the Jockey Club a man may bet against his own horse and then withdraw him, that being a question of the science of racing: but he might not, it is apprehended, be asked his opinion as to the abstract morality of that proceeding.

With respect to the admissibility in evidence of the opinion of a medical man as to the state of mind of a prisoner when on his trial for an alleged offence, the following question was proposed to the English Judges by the House of Lords: "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoners' mind, at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?" To the question thus proposed, the majority of the judges returned the following answer, "We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts admitted are not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."—*McNaghten's Case*, 1 *C. & K.*, 156.

Under the present section the question might be thus put: "You have heard the symptoms said to have exhibited by A: supposing a person to exhibit those symptoms, what would be your opinion of his mental condition?"

By a person "specially skilled" is meant, it is submitted, any person who, from his circumstances and employment, possesses exceptional means of knowledge, has given the subject particular consideration, and is more than ordinarily conversant with its details. A clerk, for instance, whose business, amongst other things, it was to scrutinize the handwriting of different people and to detect points of resemblance or variety, might give an opinion on a question of handwriting, although his "special skill" was something short of that of a first-rate London expert. If he has any 'special skill,' his opinion is relevant: the degree in which he possesses such skill, and the consequent value of his evidence is, of course, matter for comment, but the admissibility of his evidence does not depend upon it.

By Section 73, in order to ascertain the genuineness of a signature, any proved signature "may be compared with the one which is to be proved:" it would be allowable, therefore, to put the documents into

the hands of a competent witness and desire him to indicate the points of resemblance or variety.—*Arbon* v. *Fussell*, 9 *Jur. N. S.*, 753.

(3) Of course in one sense all oral testimony as to things perceived by the senses is an expression of opinion, a statement of the impression made on the senses by the thing perceived; and when a witness does not qualify the statement of the fact by saying that he is stating his opinion about it, it is only because he feels very sure of his opinion:—"I saw A coming along: he was drunk: he was a quarter of a mile off: there were over a hundred people there" really means "I saw a person coming along as to whom the impression created on my senses was that it was A: his appearance and demeanour were those of a drunk person: the distance was in my opinion a quarter of a mile: I estimate the crowd at over 100." Directly a witness feels hesitation about the correctness of the impression produced on his senses or the inference drawn by his mind from that impression, he puts in such words as "to the best of my belief," *i. e.*, this is the impression left on my senses, but I will not swear that it may not have been wrong." It is not, of course, intended to exclude evidence of this description.

As to the mode in which an expert's opinion may be proved, see Section 60.

As to proof of the Examination of Civil Surgeon and of the opinion of the Chemical Examiner to Government in Criminal Cases, see Cr. Pr. C., 323 and 325.]

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(a.) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b.) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

Opinion as to handwriting.

47. When the Court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.

[There are three ways of proving handwriting provided by the Act, viz., by an expert under Section 45, by a person acquainted with it under the present section, and by comparison under Section 73.]

Opinion as to existence of right or custom, when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

[The opinions of persons, likely to know, about village rights to pasturage, to use of paths, water-courses, or ferries, to collect fuel, to use tanks and bathing ghâts, mercantile usage and local customs, would be relevant under this section.]

Opinions as to usages, tenets, &c., when relevant.

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,(1)

the opinions of persons having special means of knowledge thereon, are relevant facts.

[(1) By Section 98, *post*, evidence may be given, with reference to a document, to show the meaning of 'technical, local and provincial expressions, abbreviations and of words used in a peculiar sense.' For this purpose the opinions of persons having special means of knowledge on the subject would be the best evidence.]

Opinion on relationship when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under Section 494, 495, 497, or 498 of the Indian Penal Code.

Illustrations.

(*a.*) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(*b.*) The question is whether A was the legitimate son of B. The fact that A was always treated as such members of the family, is relevant.

["Thus, in the Berkeley Peerage case, Sir James Mansfield remarked, that, "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate." So, the concealment of the birth of a child from the husband, —the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother,—and the fact that the child and its descendants assumed the name of the adulterer, and had never been recognized in the family as the legitimate offspring of the husband,—are circumstances that will go far to rebut the presumption of legitimacy, which the law raises in favor of the issue of a married woman.—*Tayl.*, § 584. But considerations such as these could not over-rule the conclusive presumption provided in Section 112 (*post*) as to legitimacy.

So also where the question is whether a person was the son of a particular Testator, the fact that all the members of the family appear to have been mentioned in the Will but that no notice is taken of such person, would be evidence of the Testator's opinion, expressed by conduct, as to such person's relationship, and admissible under this section.

In *R.* v. *Wazera*, 8 *B. L. R., Apx.*, 63, it was held that the mere fact of a man and woman living together as husband and wife would be sufficient, in a prosecution under Section 498 of the I. P. C., to throw the burthen of proving that they were not so on the accused: under the present section the burthen of proving a marriage is, in every such case, thrown on the prosecution.]

Grounds of opinion when relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

CHARACTER WHEN RELEVANT.

In civil cases, character to prove conduct imputed irrelevant.

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

[By 'persons concerned' is meant persons whose conduct is the object of the inquiry. It does not include witnesses, as to whom provision is made in Sections 145, 146, 153 and 155 to regulate evidence given for the purpose of affecting their credibility.]

In criminal cases, previous good character relevant.

53. In criminal proceedings, the fact that the person accused is of a good character is relevant.

Previous conviction in criminal trials relevant, but not previous bad character, except in reply.

54. In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant;[1] but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.(2)

[(1) In any criminal proceeding, accordingly, the prosecution may prove a previous conviction as part of the case, and call upon the Court to take it into account in considering the probabilities of the case; no other proof of bad character can be given except to rebut evidence of good character.

Evidence as to bad character is thus restricted, not because it is not an important element in weighing the probabilities of the case, but because it is so vague, and so difficult to rebut, that it would be liable to abuse if it were not confined to a definite, unmistakeable matter such as a previous conviction; but the consideration of character must often be of the utmost importance in weighing the probabilities of the case. A child is found robbed, raped and brutally murdered. The circumstances are such that the crime must have been committed by one of two men: the first is a noted thief, of violent habits, the second a person of refinement, wealth and benevolence; the character of the latter renders it almost incredible that he should have committed the crime, and so strengthens the case against the former. This is one of the instances in which Bentham considers that evidence of character is properly admissible in criminal cases.—*Benth. Rat. Ev., B.* V, *ch.* xiii.

Upon this section Mr. Norton observes that "the fact of a previous conviction can only be relevant for the purpose of enhancing the sentence to be passed on an accused after he has been found guilty of the crime for which he is indicted. The fact of a previous conviction of *any* offence can never be relevant as an element of proof to establish the guilt of the accused as to the crime with which he stands charged. The language of the section is not very felicitous: but it never can have this wider and more general bearing." This is, it is submitted, an erroneous view of the effect of the section. The intention, whether felicitously expressed or not, is clearly to admit evidence of a previous conviction as part of the substantive evidence of the case, from which the Courts' inference as to the prisoner's guilt or innocence will be drawn. The section puts evidence of a previous conviction on the same footing as to relevancy as that upon which the previous section puts evidence of good character. Such evidence might, of course, be unimportant, as when the former offence was so unlike the latter as to suggest no inference as to the probability of same person having committed both. But it may often be highly important, and in any case it would be relevant under this section.

(2) In proceedings under Chapter XXXVIII, Sections 504—517, of the Cr. P. C., or under Act XXVII of 1871, (Criminal Tribes,) the character of person is a fact in issue, and therefore evidence as to it is relevant under Section 5: the present section, accordingly, has no application in such a case.]

Character as affecting damages.

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.(1)

Explanation.—In Sections 52, 53, 54, and 55, the word "character" includes both reputation and disposition ;[2] but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.[3]

[(1) As to character as affecting damages, see notes to Section 12. In an action by a father for seduction of his daughter, the previous character of the daughter will be relevant; and in a petition for dissolution of marriage and for damages against a co-respondent the husband may give evidence of the terms of affection on which he lived with the respondent; and the co-respondent may give evidence of cruelty, &c., which would tend to disentitle the husband to damages. See Act IV of 1869, Section 34.

(2) This clears up a point as to which there has been a difference of opinion between English Judges, viz., whether evidence of character extends to disposition as well as to reputation. The more comprehensive meaning given to the word 'character' in this section is, no doubt, the right one, when character is regarded as a ground for inference.

(3) According to English Law, where damages are claimed by a husband on the ground of his wife's adultery, or by a father on account of his daughter's seduction, in order to show the previous character of the wife or daughter, "not only evidence of general bad character is admissible in mitigation of damages, but the defendant may even prove particular acts of immorality or indecorum."—*Tayl.*, § 530. Evidence as to particular acts would be inadmissible under the present 'Explanation.']

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

No evidence required of fact judicially noticed.

56. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts :—

(1.) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India :

(2.) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed:

(3.) Articles of War for Her Majesty's Army or Navy:

(4.) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils' Act, or any other law for the time being relating thereto.

Explanation.—The word "Parliament," in Clauses (2) and (4), includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland;
2. The Parliament of Great Britain;
3. The Parliament of England;
4. The Parliament of Scotland; and
5. The Parliament of Ireland.

(5.) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6.) All seals of which English Courts take judicial notice:[1] the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7.) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British

India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the Official Gazette of any Local Government:

(8.) The existence, title, and national flag of every State or Sovereign recognized by the British Crown :[2]

(9.) The divisions of time, the geographical divisions of the world,[3] and public festivals, fasts, and holidays notified in the Official Gazette:

(10.) The territories under the dominion of the British Crown :[4]

(11.) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons:

(12.) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders, and other persons authorized by law to appear or act before it:

(13.) The rule of the road [on land or at sea.][5]

In all these cases, and also on all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

[(1) The following Seals are mentioned by Taylor as those of which the English Courts take judicial notice:—"the Great Seal; the Queen's Privy Seal; the seal of the Duchy of Cornwall; the seals of the superior Courts of Justice; the Chancery Common Law seal; and the seal of the Chancery Enrolment Office; the seals of the Grand Sessions in Wales, now abolished; of the High Court of

Admiralty; of the Prerogative Court of Canterbury; and of the Court of the Vice-Warden of the Stanneries; the seals of all Courts constituted by Act of Parliament, if seals are given to them by the Act, and therefore the seals of the Court for Divorce and Matrimonial causes, of the principal Registry, and of the several district Registries of the respective Courts of Probate in England and Ireland, of the Courts of Bankruptcy, of the Insolvent Debtor's Court, now abolished; of the Court of Bankruptcy and Insolvency in Ireland, of the Landed Estates Court, Ireland, and of the country Courts. They will also judicially notice the seal of the Corporation of London, and the seal of a Notary-public, he being an officer recognized by the whole commercial world. Several other seals are rendered admissible in evidence without proof of their genuineness, by the express language of particular Statutes; and among them may be noticed the seal of the Board of Poor-law Commissioners; of the now discontinued General Board of Health; of Local Boards of Health; of the now abolished Metropolitan Commissioners of Sewers; of the now abolished Commissioners for the sale of Incumbered Estates in Ireland; of the Land Registry office in England; of the office for the Registration of Assurances of Lands in Ireland; of the General Register office in England, or Ireland; of the Charity Commissioners for England and Wales; of the special Commissioners for Irish Fisheries; of the Commissioners of Patents for Inventions; of the office of the Registrar of Designs for articles of manufacture; and of the Record Office. In all proceedings too, under the winding-up clauses of the Companies' Act, 1862, the seal of any Office of the Court of Chancery, or Bankruptcy, in England or in Ireland, of the Court of Session in Scotland, or of the Court of the Vice-Warden of the Stanneries, when appended to any document made, issued, or signed under those clauses, or any official copy thereof, must be judicially noticed.—*Tayl.*, § 6.

(2) Where there is a Civil war and one part of a nation establishes itself as an independent Government, the Judges are bound ex-officio to know whether or not the Government has recognized such part as an independent State.—*Tayl.*, § 5.

(3) But Courts are not bound to take judicial notice of local divisions, districts, streets, &c., or the position of places. Proper proof of such matters should therefore, if necessary, be forthcoming.

(4) By 6 and 7 Vic., c. 94 (Foreign Jurisdiction), Section 3, if in any Court in Her Majesty's dominions a question arise as to the jurisdiction of the Crown in any place out of Her Majesty's Dominions, the Court may transmit questions as to the subject to one of Her Majesty's principal Secretaries of State, and the answer returned will be final and conclusive evidence of the matters therein contained.

(5.) These words were added by Act XVIII of 1872. The addition however appears to be of questionable propriety, inasmuch as "the regulations for preventing collisions at sea," which contain the rules concerning lights, fog-signals, steering and sailing are now embodied in a Table issued by virtue of the Act 25 and 26 Vic., c. 63, and of an order in Council, dated 9th January 1863. Section 26 of the same Act enacts how those regulations are to be published and proved," viz., by the production, either of the Gazette in which any order in Council concerning them is published, or of a copy of them purport-

ing to be signed by one of the Secretaries or Assistant Secretaries to the Board of Trade or to be sealed with the seal of the Board.—*Tayl.*, §§ 5 *and* 1440.]

Facts admitted.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands,(1) or which by any rule of pleading(2) in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

[(1) As to the effect of an admission in a suit by a duly authorized Vakeel, see note (1) to Section 18.

There is no provision in the Indian Law of Procedure, as in England, for enabling one party in a suit to call upon the other to admit a fact, and in the event of the other party not doing so, to throw upon him the expense of the proof. Some such provision would be an useful addition to the Code of Civil Procedure.

(2) The English rules of pleading are so strict that the omission to contradict a fact at the right moment is often tantamount to an admission of it. "It may be broadly laid down says Mr. Taylor," that, whenever a material averment, well pleaded, is passed over by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading, if not for the purpose of trial before the jury, conclusively admitted.—*Tayl.*, § 58. Such rigidity is of course wholly foreign to Indian Procedure. Some pleas are, however, from their very nature an admission of certain facts; *e. g.*, a plea of payment of a debt necessarily admits the fact of there having been a debt: a plea of cancelment of a bond admits its execution: a plea of tender of rent to a landlord admits the fact of a tenancy. This, however, is not the result of any "rule of pleading" but of the necessary logical import of the expressions used.]

CHAPTER IV.—OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable;

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

[The oral evidence, however, need not in all cases be given before the Court itself. As to commissions to take evidence in Civil cases, see Civ. Pr. Code, Ss. 175—182; and in Criminal cases, Cr. Pr. Code, S. 330.]

CHAPTER V.—OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

[This section does not, of course, over-ride the Laws as to Stamps and Registration. As to cases in which registration of documents is compulsory, see Act VIII of 1871, S. 17; and as to those in which it is permissible, Sec. 18.]

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document:

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

[A fraudulent or unauthorized alteration of a document will render it wholly invalid. "The rule of law, says Mr. Taylor," applicable to this subject, is, that any material alteration in a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the privity of the party to be affected by it, and perhaps, also, with this additional proviso, that the alteration was made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it. This rule, which was originally propounded with respect to deeds, probably because in former days most written engagements were drawn in that form, has since been extended to negotiable securities, bought and sold notes, guarantees, and policies of assurance; and may now be said to apply equally to all written instruments, which constitute the evidence of contracts."—*Tayl.*, § 1617. Any alteration is of course suspicious and raises a presumption of fraud: "The onus of proof of the genuineness of an instrument in its altered state lies on the party claiming under it."—9 *M. I. A.*, *p.* 1. But an immaterial alteration, even by a party to the instrument, does not invalidate it.—*Aldous* v. *Cornwall*, *L. R.*, 3 *Q. B.*, 573.]

Secondary evidence.

63. Secondary evidence means and includes—

(1.) Certified copies given under the provisions hereinafter contained;[1]

(2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3.) Copies made from or compared with the original;

(4.) Counterparts of documents as against the parties who did not execute them;

(5.) Oral accounts of the contents of a document given by some person who has himself seen it.(2)

Illustrations.

(*a.*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b.*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c.*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d.*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

[(1) See Sections 76 and 77 as to certified copies.

(2) There are no degrees of secondary evidence: when once secondary evidence is admissible, the law makes no distinction between one class of secondary evidence and another: though the fact that a party, who gives oral evidence of the contents of a document, is shown to have better secondary evidence of it, for instance a compared copy of the original, might be ground for an adverse inference as to the good faith of the party so acting. There are, however, in Section 65 certain specific directions as to the kind of secondary evidence to be used in proving particular matters.]

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(*a.*) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,[1]

and when, after the notice mentioned in section sixty-six, such person does not produce it,[2]

(*b.*) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;[3]

(*c.*) When the original has been destroyed or lost,[4] or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d.*) When the original is of such a nature as not to be easily moveable;

(*e.*) When the original is a public document within the meaning of section seventy-four;

(*f.*) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(*g.*) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.[5]

In cases (*a*), (*c*), and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

[(1) As to documents which witnesses are not bound to produce, see Sections 130 and 131. A witness may also refuse to produce documents on which he has a lien. As to the general lien of Bankers, Factors, Attorneys and others on goods bailed to them, see Contract Act, 1872, Section 171. The result of (*a*) is that if the document is in the hands of a person who has a right to retain it, secondary evidence of its contents cannot be given.

(2) "It would seem that, where a party has notice to produce a particular instrument traced to his possession, he cannot object to parol evidence of its contents, on the ground that, previous to the notice, he had ceased to have any control over it, unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it; neither can he escape the effect of the notice, by afterwards voluntarily parting with the instrument, which it directs him to produce.—*Tayl.*, § 413.

(3) Section 22 provides, contrary to the English Law, that an *oral* admission of the contents of a document is inadmissible, until the person, proposing to give it, shows that he is entitled to use secondary evidence; the present clause provides that a *written* admission is admissible as proof of a document even though the original is in existence, and might be, but is not, produced.

(4) In order to prove a thing "lost" evidence must be given that it has been looked for:

"What degree of diligence is necessary in the search cannot easily be defined, as each case must depend much on its own peculiar circumstances; but the party is generally expected to show, that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery, which the nature of the case would naturally suggest and which were accessible to him.

"If the instrument ought to have been deposited in a public office, or other particular place, it will generally be deemed sufficient to have searched that place, without calling the party whose duty it was to have put it there, or any other person who may have had access to it."—*Tayl.*, §§ 399, 401.

Nor need the search have been recent, or for the purpose of the particular suit, provided the Court be satisfied that thorough search was made.

But distinct evidence of the destruction, or loss, and of reasonable search must be given. When a plaintiff alleged that a document had been partially destroyed by rats, and put in a registered copy of a deed together with certain fragments which he alleged to be the fragments of the deed, but offered no evidence of this being so, the Privy Council rejected the secondary evidence.—*Syud Abbas Ali Khan* v. *Tadeem Ramy Reddi*, 3 *M. I. A.*, 156.

"If the instrument were executed in duplicate, or triplicate, &c., the loss of all the parts must be proved, in order to let in secondary evidence of the contents; and, in all cases, before such evidence will be admissible, it must be shown that the original instrument was duly

executed, and was otherwise genuine. If the instrument were of such a nature as to have required attestation, the attesting witness must, if known, be called, or in the event of his death, his handwriting must be proved, precisely in the same manner as if the deed itself had been produced; though, if it cannot be discovered who the attesting witness was, this strictness of proof will, from necessity, be waived. In the absence of evidence to the contrary the Court will presume that the instrument was duly stamped."—*Tayl.*, § 405.

As to proof of attestation, see *post*, Sections 68—9.

Oral evidence of the contents of a document containing a promise or acknowledgment in respect of a debt or legacy cannot in any case be given for the purpose of taking the case out of the operation of the Limitation Act, 1871, though oral evidence as to its *date* may be given. See Act IX of 1871, Section 20.

(5) The word "result" must be construed strictly to mean the actual figures or facts arrived at, not the general effect on a person's mind. "This exception" says Mr. Taylor, speaking of the English Rule on the subject, "will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have since been destroyed, if the object of the examination be to elicit from the witness the impression which they produced on his mind, with reference to the degree of friendship subsisting between the writer and a third party.—*Tayl.*, § 432.]

Rules as to notice to produce.

66. Secondary evidence of the contents of the documents referred to in section sixty-five, clause *(a)*, shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [*or to his attorney or pleader] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:[1]

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1.) When the document to be proved is itself a notice;

(2.) When from the nature of the case, the adverse party must know that he will be required to produce it;

* Added by Act XVIII of 1872.

(3.) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4.) When the adverse party or his agent has the original in Court;

(5.) When the adverse party or his agent has admitted the loss of the document;

(6.) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

[As to notice to produce in Civil cases, see C. P. C., Sections 40, 43 and 107-8. In Criminal cases the best course would appear to be to apply for a summons under Sections 365-7, but any reasonable notice would, apparently, be sufficient to let in secondary evidence.

The notice to produce a document should describe it "with all convenient certainty." "It may be difficult to lay down any general rule as to what the notice ought to contain, since much must depend on the particular circumstances of each case; but this much is clear, first, that no mis-statement or inaccuracy in the notice will be deemed material, if it be not really calculated to mislead the opponent; and next, that it is not necessary, by condescending minutely to dates, contents, parties, &c., to specify the precise documents intended. If enough is stated on the notice to induce the party to believe that a particular instrument will be called for, this will be sufficient. Thus a notice to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action," or "all letters written to or received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf; and also all books, papers, &c., relating to the subject-matter of this cause," has been held sufficient to let in parol evidence of a particular letter not otherwise specified.—*Tayl.*, § 413. But a mere notice to produce "all letters and books relating to the cause" has been held by the English Courts to be too vague.

"The Legislature has interfered on behalf of merchant-seamen, whose proverbial inexperience and recklessness have rendered them fit objects for special statutory protection, and has enacted, that every seaman may bring forward evidence to prove the contents of his agreement with the master of the ship, or otherwise to support his case, without producing, or giving notice to produce the agreement itself or any copy of it."—*Tayl.*, § 424; 17 and 18 Vic., c. 104, S. 165.

It will be observed that under this section the Court has the power of dispensing with the notice "in any case in which it thinks fit." This is a relaxation of the procedure in force in the English Courts.]

Proof of signature and hand-

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the

writing of person alleged to have signed or written document produced.

handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Comparison of handwritings.

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may

be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[As to proof of identity of handwriting, see Sections 45 and 47.]

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents :—

1. Documents forming the Acts, or records of the Acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial, and executive, whether of British India or of any other part of her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

Private documents.

75. All other documents are private.

Certified copies of public documents.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such

officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

[This with Sections 77 and 80 provides for proof of judicial records. Proof of previous conviction in criminal cases is specially provided for in Section 326 of C. P. C.]

Production of such copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of other public documents.

78. The following public documents may be proved as follows:—

(1.) Acts, orders, or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,

by the records of the departments certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2.) The proceedings of the Legislatures,

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government:

(3.) Proclamations, orders, or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer:

(4.) The Acts of the Executive or the proceedings of the legislature of a foreign country,

by journals published by their authority, or commonly received in that country as such; or by a copy certified under the seal of the country or Sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council:

(5.) The proceedings of a municipal body in British India,

by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6.) Public documents of any other class in a foreign country,

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

PRESUMPTIONS AS TO DOCUMENTS.

Presumption as to gunuineness of certified copies.

79. The Court shall presume[1] every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified, by any officer in British India, or by any officer in any native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer, by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

[(1) There are some presumptions as to documents, known to English Law, for which no express provision is made in the Act, and which therefore can be raised only under the general provision in Section 114. Thus "when several sheets of paper, constituting a connected disposal of property, are found together, the last only duly signed and attested, the Court, in the absence of direct proof, and even in spite of partial inconsistencies in some of the provisions, will presume that each of the sheets so found formed a part of the Will at the time of its execution."—*Tayl.*, § 132. So also the Court will presume that pencil alterations in a Will are deliberative, especially if there be other alterations in ink, or if the rest of the Will appears to be drawn with care, while the pencil alterations are incomplete and inaccurate. But this presumption may be got rid of by proof of any facts tending to show that the pencil alterations were finally intended to form part of the Will.

So also the English Law presumes that all alterations, interlineations and erasures in a Will were made subsequent to the execution of the Will and codicils, and will grant probate of the Will in its original form: the contrary presumption is raised in the case of deeds, and even as to Wills, original *blanks filled up* will be presumed to have been filled up previous to the execution. So also there is, except in certain special cases suggestive of collusion, a general *primâ facie* presumption that all documents were made on the day they bear date.—*Tayl.*, §§ 134, 137.

According to English Law there is a conclusive presumption that a deed under seal has been executed for good consideration; and want of consideration cannot, except when fraud is alleged, be pleaded against such an instrument. No such presumption is sanctioned by the present Act.]

Presumption on production of record of evidence.

80. Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement, or confession was duly taken.

[This appears to refer only to judicial records of Courts in Her Majesty's Dominions: as to the presumption as to judicial records of Courts in other countries, see *post*, Section 86.]

Presumption as to Gazettes.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency, or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document puporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

[As to the meaning of proper custody, see *post*, Section 90.]

Presumption as to document admissible in England without proof of seal or signature.

82. When any document is produced to any Court purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp, or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

[By 8 and 9 Vic., c. 113, (the Documentary Evidence Act, 1845) it is provided that "wherever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any Corporation or joint-stock or other Company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, is receivable in evidence of any particular before any legal tribunal or in any judicial proceeding, *the same shall be respectively admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed or sealed alone, or impressed* with a stamp and signed as directed by the respective Acts made or to be hereafter made, *without*

any proof of the seal or stamp, when the seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same.

By the English Common Law, official registers, books kept in public offices recording particular transactions, and other documents of a public nature are generally admissible in evidence without proof of their authenticity by the evidence of the persons who prepared them. And, by 14 and 15 Vic., c. 99, Sec. 14, whenever any document is of such a public nature as to be admissible in evidence on its mere production from proper custody, and no Statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified by the officer to whose custody the original is entrusted. Under this provision it has been decided that certified copies may be given in evidence of the contents of parish registers, of the books of Births, Marriages and Deaths in India which are deposited with the Secretary of State; of registers of marriages kept by British Consuls abroad previous to 28th July 1849; (12 and 13 Vic., c. 68, Section 28); and of foreign registers of marriage, on proof that they are required to be kept by the laws of the countries to which they respectively belong.—*Tayl.*, § 1438.

The following are some of the documents which, under the provisions of the English Statute Law, can be proved by certified copies, and which are of likely occurrence in Indian Courts; Registers of Births, Marriages and Deaths made pursuant to the Registration Act, 6 and 7, W. 4, c. 86, Registers of Marriages of British Subjects which since 28th July 1849 have been kept by British Consuls, and certified copies of which have been transmitted to the Registrar General, 12 and 13 Vic., c. 68, Section 11: the Registers of British Ships and all declarations made under the Merchant Shipping Act, 1854, Part II, as to ownership, measurement and registry of British Ships, 17 and 18 Vic., c. 104, Section 107; the regulations for preventing collisions at sea, and the rules concerning lights, fog-signals, steering and sailing may be proved either by the production of the *Gazette* in which any order in Council concerning them is published, or a copy of them purporting to be signed by one of the Secretaries or Assistant Secretaries to the Board, or to be sealed with the seal of the Board; documents transmitted by Shipping Masters and Officers of Customs to the Registrar General of Seamen, under 17 and 18 Vic., c. 104, Section 277, may also be proved by a certified copy.—*Tayl.*, § 1440.]

Proof of maps made for purposes of any cause.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Presumption as to collections of

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of

laws and reports of decisions.

the Government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the Courts of such country.

Presumption as to powers of attorney.

85. The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul, or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

[See Indian Registration Act, 1871, Section 33, as to powers of attorney recognized for the purposes of that Act. The provisions of that section are not affected by the present Act; see *ante*, Section 2.]

Presumption as to certified copies of foreign judicial records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Presumption as to books & maps.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Presumption as to telegraphic messages.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds

with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to due execution, &c., of documents not produced.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped, and executed in the manner required by law.

[Where the document is called for and not produced, the Court *shall* make the prescribed presumption: in the case of other documents, the Court *may* make the presumption, if it thinks fit under Section 114: but it is not obligatory.]

Documents thirty years old.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations.

(*a.*) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(*b.*) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c.*) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

[In England it is questionable whether this rule applies to an instrument bearing the seal of a Court or Corporation.—*Tayl.*, § 74. No such distinction is retained in the present Act.]

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

Evidence of terms of written contract.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document,[1] no evidence shall be given in proof of the terms of such contract, grant or other disposition of property,[2] or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.[3]

Exception 2.—Wills [*admitted to Probate in British India] may be proved by the Probate.[4]

Explanation 1.—This section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document,

* Substituted by Act XVIII of 1872.

and to cases in which they are contained in more documents than one.(5)

Explanation 2.—Where there are more originals than one, one original only need be proved.(6)

Explanation 3.—The statement in any document whatever of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.(7)

Illustrations.

(*a.*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b.*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c.*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d.*) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the facts that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e.*) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

[See Indian Contract Act, Section 10, as to contracts which must be in writing.

(1) The most important class of matters required by law to be reduced to the form of a document are testamentary dispositions of property in cases to which the Indian Succession Act, 1865, or the Hindu Wills Act (XXI of 1870) apply. The latter enactment affects the Wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and the Presidency Towns of Madras and Bombay: it must be remembered, however, that this chapter does not affect any provision of the Indian Succession Act, 1865, as to the construction of Wills: see *post*, Section 100.

Promises or Acknowledgments in respect of a debt or legacy must, in order to defeat the operation of the Limitation Act, 1871, Section 20, be in writing and signed. As to such promises or acknowledgments in suits instituted previous to 1st April 1873, see Act XIV of 1859, Section 4. Such promises need not be supported by consideration. See Contract Act, 1872, Section 25, (3).

The acceptance of an inland Bill of Exchange, in cases governed by English Law, must be in writing, Act VI of 1840, Section 2. Promises made on account of natural love and affection between parties standing in a near relation to each other, though without consideration, are valid under the Contract Act, 1872, Section 25, (1), if in writing and registered. Previous to the passing of the Contract Act,

1872, there were various transactions, such as leases, agreements for leases, promises to answer for the debt of another, ratifications of debts incurred during minority, which, as between parties personally subject to English Law, were invalid unless reduced to writing. This necessity no longer exists. As to contracts by Municipalities, see Act IX of 1867, (Madras), Section 4 : IV of 1873, (Panjab), Section 18 : III of 1864, (Bengal), Section 9 : III of 1872, (Bombay), Section 54.

By Section 36 of Act XIX of 1868 (Oudh Rent Act) in a suit between landlord and tenant, the tenant is not liable to pay rent other than that payable for the last preceding year unless the court is satisfied by evidence in writing that the parties have so agreed.

The requirements of Hindu Law with respect to the necessity of a document are thus discussed by Scotland, C. J., "Upon the only point now before us we must hold the present transaction valid. It seems from the case just referred to and other authorities, that, under the Hindu Law, proof of a verbal grant of land, whether by way of exchange, sale or gift, is good when followed by possession and otherwise unobjectionable. Indeed in no case does Hindu Law appear absolutely to require writing, though as evidence it regards and inculcates a writing as of additional force and value. 1 *Strange's Hindu Law*, 277. (See also a case decided by the Madras Sudder Adalat, Special Appeal No. 56 of 1857, where a verbal assignment of waste land was held valid.)"

"There are instances, no doubt, in which works of authority speak expressly of particular transactions being evidenced by writing. But I believe in no case can it be considered now that the Hindu Law in this respect is treated as being anything more than directory. The great importance and value, however, of written instruments as evidence, make it most desirable for the true interests of the parties and the ends of justice that they should be generally adopted ; and where from the circumstances and nature of the transaction, or the dealings between the parties, or from the usages of the country, a writing was reasonably to be expected, mere oral evidence would very properly be received and acted upon with extreme caution and deliberation ; as such evidence alone can unquestionably be easily made the means of falsehood and fraud. The reported cases, in which the Sudder Court appears to have decided against the sufficiency of oral evidence in the instances of a sale of land, an assignment of a bond, and a perpetual lease, we cannot, I think, regard as satisfactory authorities in so far as they were intended to decide not merely the insufficiency of the particular circumstances in evidence in each case, but that the law rendered a writing absolutely indispensable to the validity of such sales, assignments and leases."—*Mantena Rayaparaj* v. *Chekuri Venkataraj*, 1 *M. H. C. R.*, 100.

The authority to the widow to adopt need not be in writing, though it generally is ; as in prudence it ought to be, time and means existing. *Strange H. L.*, 80. Nor need the adoption itself be in writing, *Id.* 93, and though in cases of partition the law prescribes "a written memorial of distribution, yet it has not rendered it indispensable."—*Id.* 222. "We understand it to be undisputed, said their Lordships, in the Judicial Committee, that a division (of a joint Hindu family) may be effected without instrument in writing."—*Rewan Persad* v. *Mt. Radha Beebee*, 4 *M. I. A.*, 168.

The meaning of the expression "reduced to the form of a document," is thus explained by Mr. Taylor :

"So where, at the time of letting some premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes; and where, upon a like occasion, a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over, and assented to by the tenant, who agreed to bring a surety and sign the agreement on a future day, but omitted to do so; and where, in order to avoid mistakes, the terms upon which a house was let, were, at the time of letting, reduced to writing by the lessor's agent, and signed by the wife of the lessee, in order to bind him, but the lessee himself was not present, and did not appear to have constituted the wife as his agent, or to have recognised her act, further than by entering upon and occupying the premises; and where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer, containing the terms of the letting, but this paper was never signed either by the auctioneer or by the parties; and where, on the occasion of hiring a servant, the master and servant went to the chief constable's clerk, who in their presence, and by their direction, took down in writing the terms of the hiring, but neither party signed the paper, nor did it appear to have been read to them; in all these instances the Court held that parol evidence was admissible, since the writings only amounted, either to mere unaccepted proposals, or to minutes capable of conveying no definite information to the Court or Jury, and they could not, by any sensible rule of interpretation, be construed as memoranda, which the parties themselves intended to operate as fit evidence of their several agreements."—*Tayl.*, § 377.

(2) This will not preclude proof being given *aliunde* of the consideration for a contract where no mention of it is made in the contract and where, as is often the case, it is necessary to prove consideration in order to support the validity of a contract. If A contracts with B, the consideration which leads him to do so is B's contract with him, and, if this has not been reduced to writing, there is no objection to its being proved in any other way. This is the English Law. "If no consideration is stated in a deed, the party will be allowed to prove one by extrinsic evidence: and if the deed is expressed to be made "for divers goods considerations" it may be averred and proved by parol that the bargainee gave money for his bargain.—*Peacock* v. *Monk*, 1 Ves. Sen., 128; *Tayl.*, § 1040.

(3) "So the fact of birth, baptism, marriage, death, or burial, may be proved by parol testimony, though a narrative or memorandum of these events may have been entered in registers, which the law requires to be kept, for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care."—*Tayl.*, § 386.

(4) As to grant of probate where the Will has been lost, mislaid or destroyed, see Indian Succession Act, 1865, Sections 208, 209; and where the original is in possession of a party residing out of the province, who refuses or neglects to deliver it up, Section 210. Where the Will is in the possession of a person, out of the province, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary on the interests of the estate that probate be granted forthwith, probate may be granted upon the copy limited until the Will or an authenticated copy be produced.

(5) When a contract is completed through a broker, the ordinary course is for him to sign an entry in his book, as common agent of the seller and buyer, and to send a 'bought note' to the buyer, and a 'sold note' to the seller. Some doubts have been expressed in the English Courts as to what in such a case is the document containing the contract: on some occasions it has been held that the broker's signed entry is the original contract, and the bought and sold notes only copies of it: in others it has been found as a fact that by the custom of trade, the bought and sold notes constituted the contract. If there be no bought and sold notes, or if the bought and sold notes differ, the original signed entry must be resorted to and will bind the parties.

The Calcutta High Court has held that, where a contract of sale is effected through a broker, who sends bought and sold notes to the buyer and seller, the fact that the bought and sold notes did not agree and were not returned by the parties is not positive evidence that the parties did not agree. The contract was made before the notes were written and the notes were sent by the broker to his principals merely by way of information: and the plaintiff is entitled to give parol evidence of the terms of the contract.—*Carton* v. *Shaw*, 9 *B. L. R.*, 245.

Pitt's v. *Beckett*, 13 *M. & W.*, 746. "The bought and sold notes are *primâ facie* evidence of the contract between the parties: but they are not necessarily the real contract. It is still competent to the defendant to show that they were not the contract. The plaintiff has to prove not only that they were signed, but that they were signed as the contract between the parties.—*Wilde, B., in Rogers* v. *Hadley*, 32 *L. J., Ex.* 191. See also *Cowie* v. *Remply*, 3 *M. I. A.*, 500.

(6) See Section 62, Explanation 1.

(7) The section applies only to evidence given *in proof of the terms* of a contract and therefore *the fact of there being a contract* may be proved orally though it has been reduced to writing: *e. g.*, as between landlord and tenant, the fact of the tenancy, though there is a lease, but not whether any, or what rent was due.—*Tayl.*, § 372.

So, if the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness, who has seen the tenant occupy, notwithstanding it appears that the occupancy was under an agreement in writing; and where a tenant holds land under written rules, but the length of his term is agreed on orally, the landlord need not produce these rules in an action of trespass under a plea denying his possession, because such plea only renders it necessary for the plaintiff to prove the extent of the tenant's term, which, having been agreed to by parol, does not depend upon the written rules. The fact of partnership may also be proved by parol evidence of the acts of the parties, without producing the deeds; and the fact that a party has agreed to sell goods on commission may be established by oral testimony, though the terms respecting the payment of the commission have been reduced into writing.—*Tayl.*, § 376.

Illustrations (*d*) and (*e*) give examples of matters, the mention of which in a document does not preclude their proof *aliunde;* in (*d*)

because the fact mentioned, *i. e.*, A's having paid the price of the other indigo was not one of the terms of the contract: in (*e*) because a memorandum of receipt is not a "contract, grant, or disposition of property," and therefore no mention of any fact in a receipt interferes with its being proved in any other manner.

This rule applies to cases in which parties agree orally to abide by the terms of a written agreement: *e. g.*, if a landlord agrees by parol with his tenant to hold on the terms of a former lease made between the landlord and a stranger, he cannot sue on the contract without producing the lease.—*Turner* v. *Power*, 7 *B. & C.*, 625; *Tayl.*, § 372.

As to the mode of stopping oral evidence of contracts so reduced to writing, and as to the course to be pursued where oral evidence is tendered of the contents of a document, see *post*, Section 144.]

Exclusion of evidence of oral agreement.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.[1]

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved.[2] In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.[3]

Proviso (4). The existence of any distinct subsequent oral agreement[4] to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.[5]

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.[6]

Illustrations.

(*a.*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(*b.*) A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the 31st March, cannot be proved.

(*c.*) An estate called 'the Rampore tea estate' is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(*d.*) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(*e.*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f.*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(*g.*) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs. 500.' B may prove the verbal warranty.

(*h.*) A hires lodgings of B, and gives B a card on which is written —'Rooms, Rs. 200 a month.' A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(*i.*) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

(*j.*) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

[(1) This is in accordance with English Law, which allows evidence to be given in variance of the terms of a contract to show that, though no illegality is apparent on the face of it, the transaction was really unlawful and the agreement, consequently, void.

So also extrinsic evidence is permissible to show that certain words in a contract must, from the circumstances of the case, have been inserted by mistake. Thus, where a charterparty was dated February 6th, and contained a covenant that a ship should sail on February 12th, evidence was admitted to show that in fact the charterparty was not signed till March 15th, and that, consequently, the stipulation as to the ship sailing on February 12th, could have formed no part of the contract.—*Hall* v. *Cazenove*, 4 *East*, 477. As to Wills, see *Guardhouse* v. *Blackburn*, *L. R.*, 1, *Pr.* 109.

In the Exchequer Chamber it has been held that, where a party had specially stipulated that he was acting as agent for another, and had signed as such agent for his absent principal named, he was at liberty to show by way of equitable defence that the agreement, which had been drawn up in such terms as to make him personally liable, was so written by mistake and did not express the real contract.—*Wake* v. *Harrop*, 30 *L. J.*, *Ex.*, 273; 31 *L. J.*, *Ex.*, 451.

As to cases in which a Court of Equity will allow mistake to be shown without reforming the agreement, see Sugden's Vendors and Purchasers, 10th edition, p. 224, Sections 18, 20 and 24.

In *Vorley* v. *Barrett*, 26 *L. J.*, *C. P.*, 1, an action against a surety, the defendant pleaded that the plaintiff had, without the defendant's consent, released the surety. To this it was replied that the agreement, by which it was alleged that the principal debtor was released, was worded by mistake so as to include the present claim, and that the plaintiff did not otherwise discharge the debtor, and that the true agreement was, in all respects, performed. This was held a good defence.

As to the circumstances under which mistake, fraud, want of capacity in a contracting party or want of consideration will avoid a contract, see Contract Act, 1872, Sections 20—22.

The effect of this proviso and Illustration (*e*) is somewhat to extend the rule of the English Courts of Equity, according to which a suitor asking for specific performance cannot set up that part of the agreement was inserted by mistake, though a defendant resisting specific performance could do so.

(2) Thus where plaintiff had lent money to defendant and there was an entry in plaintiff's book of the amount of the loan and the rate, but not as to date of repayment, evidence would be admissible of a contemporaneous oral agreement as to the time of repayment.—*Beharry Lal* v. *Kameenee Soodaru*, 14 *Suth. W. R., C. R.*, 320.

The intention of the parties that the writing should not contain the whole agreement between them may be shown by direct evidence, or inferred from the informality of the document.—*Leake*, 103, *Note b.*

It often happens that the parties to a conveyance, purporting on its face to be a purchase deed, seek to enforce it as a mortgage. This a Court of Equity can do. "That this Court," said Lord Cottenham in a case of this nature, "will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appears that the parties intended it to be a mortgage, is no doubt true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a re-purchase, not acted upon, will not of itself entitle the vendors to redeem."—*Williams* v. *Owen*, 3 *My. & Cr.*, 303. "Some difficulty," it has been observed, arises occasionally in determining whether a conveyance is intended to be a mortgage or not. Where this is the case, parol evidence will be admitted to show that, what appears on the face of it to be an absolute conveyance, was intended to be a conveyance by way of mortgage only. Thus, in *Maxwell* v. *Montacute*, Prec., Ch. 526, where a person refused to execute according to agreement a defeasance, after the mortgagor had executed an absolute conveyance, Lord Nottingham admitted parol evidence to show the agreement, and decreed against the mortgagee."—2 *W. and T., L. C.*, p. 956. On the same principle, *Peacock, C. J.*, laid down that, although *mere verbal* evidence was inadmissible to contradict a written contract, yet the real intention of the parties to it, as to whether a sale should be absolute or conditional, must be gathered from the collateral circumstances of the case.—*Kasheenath Chatterjee* v. *Chundee Churn Banerjee*, 5 *S. W. R.*, 68. The Judicial Committee of the Privy Council have recently decided in *Mt. Thukrain Sookraj Koowar* v. *The Government and others*, that Trusts may often exist, not reduced to writing, which the Courts will recognize.—*Mussumat Thukrain Sookraj Koowar* v. *Government*, 14 *M. I. A.*, 112.

Under the present proviso the Courts will have to consider (1) whether the matter is one about which the document is silent; (2) whether the alleged contemporaneous agreement is inconsistent with the provisions of the document, and (3) whether the formality of the document renders it improbable, or its informality renders it probable that the parties did not intend to express the whole of their intentions in it. Of course the more formal the document, the greater is the probability that the parties intended it to comprise the entire transaction, and the greater, consequently, will be the Court's reluctance to let in oral evidence of a separate agreement.

This is shown by the two cases in Illustration (*h*). So with regard to (*i*) if there is a regular written contract of sale, so framed as, apparently, to cover the entire transaction, oral evidence of a warranty or of a representation that the goods were of a particular quality would be rejected.—*Harnor* v. *Graves*, 24 *L.J.*, *C.P.*, 53. So where a tenant occupied premises under a written agreement, parol evidence of an understanding between the parties that the rent should commence from a later date than that mentioned in the agreement, was refused.—*Henson* v. *Cooper*, 3 *Scott, N. R.*, 48. But a mere informal memorandum will not have the same affect: thus the following memorandum of the hire of a horse, "six weeks at two guineas, W. H.," was held not to exclude evidence of a contract that all accidents occasioned by the horse's shying, should be at the risk of the hirer. But the separate oral agreement must not be inconsistent with the terms of the written one: thus the acceptor of a Bill of Exchange cannot set up a parol contract inconsistent with the contract on the face of the Bill: *e. g.*, an acceptor cannot show that a Bill was given by way of security for the repayment of a debt which was agreed to be paid in instalments.—*Besaul* v. *Cross*, 20 *L. J.*, *C. P.*, 173.

So again, where a bond is conditioned for payment absolutely, the defendant will not be allowed to show that there was an agreement, that the bond should operate merely as an indemnity: nor when a note was, on the face of it, payable on a day certain, to show an oral agreement that it should be payable on a contingency, or that it should not be paid but be renewed. And so, where a promissory note is in its terms joint, one of the parties cannot show that he is a surety only; nor when a person has signed as Principal, can he show that he was merely an agent.

So when a policy of Insurance was on an adventure from Archangel to Leghorn, evidence was not allowed to be given of a parol agreement that the risk should commence at a shorter point.—*Good*, 364. But this will not preclude a party from availing himself of any Equities to which the circumstances of the case give rise. As where money has been advanced on a joint and several promissory note, one of the makers of which is merely surety for the other, and this fact is known to the lender; in such case the surety, notwithstanding the form of the note, may plead as an equitable defence that he was known to the lender to be surety when the note was made, and that without his consent time has been given by the lender to the principal debtor.—*Tayl.*, § 1054.

In *Bholonath Khettri* v. *Kahprasad Agurwalla*, 8 *B. L. R.*, 91, Paul, J., over-ruling a decision of the Full Bench, and relying on *Muttyloll Seal* v. *Anundchunder Sandle*, 5 *M. I. A.*, 72, held that evidence was admissible to prove a verbal defeazance of a written contract, as *e. g.*, that a conveyance of lease and release was in the nature of a mortgage, with a power of redemption. Paul, J., pointed out that there were instances in which the parties agree that a document shall be executed *not embodying* all the terms by which they are to be bound; and in such cases it cannot be said that the *terms of the contract have been reduced to writing.*

In *Morgan* v. *Griffith*, *L. R.*, 6 *Ex.*, 70, the plaintiff had agreed to hire certain grass land of the defendant, and had refused to sign the

lease unless the defendant would promise to destroy the rabbits. The defendant refused to put a term to this effect in the lease, but promised orally to destroy them. The plaintiff afterwards sued for the failure to destroy. Held that the oral agreement was collateral to the lease and that evidence of it was properly admitted.

(3) Thus "it may be shown by parol evidence that an instrument, apparently executed as a deed, had really been delivered simply as an escrow, or that a document signed as an agreement, had not been intended by the parties to operate as a present contract, but that it was meant to be conditional on the happening of an event, which had never occurred."—*Tayl.*, § 1038. For instance, where a bond recited the receipt of Rupees 200 and promised interest and repayment on demand, the defendant proposed to show by oral evidence that the real consideration for the bond was, not the Rupees 200, but the plaintiff's abstinence from preventing the defendant negotiating another loan, and that the plaintiff did not so abstain: it was held that the defendant was at liberty to give evidence of the alleged verbal agreement, as, if the defendant's statement was true, the agreement was that the bond should become binding only in certain events, which had not happened; and the agreement had accordingly never become binding on the defendant.—1 *M. H. C. R.*, 457. See also *Pym* v. *Campbell*, 6 *E. & B.*, 370.

(4) The English rule that the obligation imposed by a deed can be dissolved only by an instrument of equal solemnity, does not apply in India. The only cases in which a contract, grant or disposition of property cannot subsequently be set aside by word of mouth, are

(1) when the contract, grant or disposition is one which is by law required to be in writing:

(2) when it has been registered.

(5) Where a written instrument provided for a joint-tenancy and joint-contract by all the parties executing it to pay the whole rent of the village without any reference to the quantity of land held by each:

Held that oral evidence was not admissible to show that separate specific contracts imposing a several liability on each according to the amount of land held by him: and that it made no difference that the evidence was put forward as evidence of a custom.—*Morris* v. *Panchanada Pillay*, 5 *M. H. C. R.*, 135.

The meaning of the term 'inconsistent' as used in reference to this subject, and the reasons for admitting evidence of usage in such cases, were thus explained by Lord Campbell, C. J., in *Humphrey* v. *Dale*. In that case linseed oil had been purchased through London brokers, by bought and sold notes, and the name of the purchaser was not disclosed in the bought note. Evidence was received of a usage of trade in the City, by which every buying broker, who did not at the time of the bargain, name his principal, rendered himself liable to be treated as the purchaser by the vendor. "In a certain sense," observed Lord Campbell, every material incident which is added to a written contract, varies it, makes it different from what it appeared to be and so far is inconsistent with it. If by the side of the written contract without, you write the same contract with, the added incident, the two would seem to import different obligations, and to be

different contracts. To take a familiar instance by way of illustration: on the face of a Bill of Exchange at three months after date, the acceptor would be taken to bind himself to the payment precisely at the end of the three months; but by the custom he is only bound to do so at the end of the days of grace, which vary according to the country in which the bill is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which, of course, might vary infinitely, leaving to implication and tacit understanding, all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception therefore of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent. Thus to warrant bacon to be *prime signed*, adding 'that is to say *slightly tainted*,' as in *Yates* v. *Pym*, 6 *Taunton*, 446; or to insure *all* the boats of a ship and add 'that is to say *all not slung on the quarter* as in *Blackett* v. *The Royal Exchange Assurance Company*, 2, *C. and J.*, 244, and other cases of the same sort scattered through the books would be instances of contracts *in which* both the two parts could not have *full effect given to them if written down*; and, therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also. Without repeating ourselves it will be found that the same reasoning applies when the evidence is used to explain a latent ambiguity of language. Merchants and Traders with a multiplicity of transactions pressing upon them, and moving in a narrow circle and meeting each other daily, *desire to write little and leave unwritten what they take for granted in every contract.* In spite of the lamentations of Judges, they will continue to do so: and in a vast majority of cases, of which the Courts of Law hear nothing, they do so without loss or inconvenience: and upon the whole they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind and such as are not likely to exclude the actual facts of the dealings between parties, when they are to determine on the controversies which grow out of them. It cannot be doubted, in the present case, that in fact this contract was made *with the usage understood to be a term in it*: to exclude the usage is to exclude a material term of the contract and must lead to an unjust decision.—*Humphrey* v. *Dale*, 7 *E. & B.*, 266.

But where an usage conflicts with the expressed intention of the document, the latter must be followed: thus, where in an agreement between an African Merchant and an African Captain, the latter was to have a commission of "£6 per cent. on the *net proceeds of the homeward cargo*, after deducting the usual charges" parol evidence was not admitted to show that, according to the course of trade between African Captains and Merchants, the Captain was entitled to a commission on the *whole amount for which the cargo had been sold*, and not merely the net profits.—*Laine* v. *Horsfall*, 3 *C. & K.*, 349.

So also where A contracted to deliver to B 2,000 maunds of fresh, clean and good up-country Indigo, guaranteed growth of season, 1870-1, A was not allowed to prove a custom of mixing seeds of two crops so as to bring up the sample to an average quality, as this would be distinctly at variance with the terms of the contract.—*Macfarlane & others* v. *Carr & others*, 8 *B. L. R.*, 459.

In *Spartali* v. *Benecke*, 19 *L. J.*, *C. P.*, 293, there was a sale of goods at a specified price, "to be paid for by cash in one month, less 5 per cent. discount, it was held that evidence could not be given of an usage of trade, by which vendors in such contracts were not bound to deliver without payment; such an usage being inconsistent with the terms of the contract. This judgment must, however, be considered as over-ruled by *Field* v. *Lelean*, subsequently decided in the Exchequer Chamber. In that case the contract was "Bought—250 shares, at £2-5*s.* per share, £562-10*s.* for payment, half in two, half in four months; it was held that parol evidence of a custom among dealers in such shares, that delivery should take place concurrently with payment, was admissible.—*Field* v. *Lelean*, 30 *L. J.*, *Ex.*, 168.

So also the drawers of a Hundi in favor of plaintiff at Dacca, (where all parties to the hundi lived) were not held liable on proof that they were the gomastas of the acceptor, had no interest in the hundi, and that, according to the custom of Dacca, where the hundi was drawn and accepted, agents are not, under such circumstances liable, though the agency does not appear on the hundi.—*Hazari Mull* v. *Sobagh Mull*, 9 *B. L. R.*, 1.

Where there is a usage or custom of trade, the intention of the parties to exclude a contract from its operation must be shown by the contract itself, and cannot be proved by other evidence. Thus, where there was a sale of rum, no mention being made of warehouse rent, evidence was admitted that, by custom of trade, an allowance for warehouse rent was incorporated in such contracts; but evidence that the parties had orally agreed to make an allowance different from the customary one, was refused.—*Fawkes* v. *Lamb*, 31 *L. J.*, *Q. B.*, 98.

As to the "usage" which may be proved as adding an incident to a written contract, "there needs not either the antiquity, the uniformity or the notoriety of custom, which, in respect of all these becomes a local law. The usage may be still in the course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into the contract."—*Juggomohun Ghose* v. *Manichund*, 7 *M. I. A.*, 282.

In an action against the drawer of a bill of exchange drawn and indorsed in England, and payable abroad, and dishonored, evidence is not admissible to prove a usage among merchants here to entitle the holder, at his option, to demand from the drawer the amount of re-exchange, or the sum which he gave for the purchase of the bill. This being a usage which in terms contradicts the written instrument. —*Suse* v. *Pomp*, 30 *L. J.*, *C. P.*, 75.

(6) Under this proviso, it is apprehended, evidence might be given as to what did, as a fact, pass by a deed, the language of which is susceptible, with equal propriety, of two constructions. For instance, where premises were leased, including a yard described by metes and

bounds, and the question was whether a cellar under the yard was or was not included in the lease, oral evidence was admitted that at the time of the lease, the cellar was in the occupancy of another tenant, and so could not have been intended to pass by the lease.—*Doc.* v. *Bust*, 1 *T. R.*, 701. Thus also where an admission in writing is necessary, it does not follow that the document must be self-contained, or that nothing beyond the document can be looked at to determine the subject of the admission. Thus in *S. A.* 446 *of* 1869, *Madras H. C. R.*, *Vol.* V, 320, in a suit for redemption of mortgaged land, the defendant had given a written admission that he held land upon mortgage in a specified district from the plaintiff, and external evidence was admitted to show to what land the admission referred.

So where in an answer to a letter by mortgagor's agent, desiring to see the mortgagee on the subject of his claims on the property, the document relied on as an acknowledgment of the mortgagor's title merely was "Sir, I received yours of the 2nd instant, I do not see the use of a meeting unless some party is ready with the money to pay me;" this was held a sufficient acknowledgment of the mortgagor's title to redeem. So in another case the V. C. observed, "it appears to me that the Court, being in possession of the circumstances of the case, must construe the letter in the way in which the writer intended it to be construed by the person to whom it was addressed."

A Pottah is a generic term, embracing every kind of engagement between a Zemindar and his Tenants, or Ryots. If the Pottah does not contain the term "Mocurrery" or equivalent words of limitation, as "from generation to generation," it is not *primâ facie* to be assumed to grant a Mocurrery-instimirary, or perpetual tenure; but evidence of long uninterrupted enjoyment, at a fixed unvarying rent, will supply the want of words of limitation in such Pottah.

Where, therefore, Pottah, dated 1792 was granted to the predecessor in title of A by the predecessor in title of B, addressed to him as Moostager or Farmer, without any words of limitation, and the property comprised in the Pottah remained in the uninterrupted possession of the lessee and his successor at a fixed rent up to the year 1861, it was held, that such long and uninterrupted possession conferred a sufficient title to defeat the right of the then Landlord to an enhancement of rent under the provisions of Act No. X of 1859.—11 *M. I. A.*, 433.

Under Act IX of 1871, an acknowledgment in respect of a debt or legacy may be sufficient for the purposes of Section 20, though it is undated, and though it omits to specify the exact amount of the debt or legacy. Extrinsic evidence will be admissible to establish these points. See also *Umesh Chundra Mooherjee* v. *E. Sageman*, 5 *B. L. R.*, 633, as to evidence to identify a note.

So also, where in a deed of arrangement between the members of a Hindu family and the childless widow of one of the co-heirs, in respect of certain joint estate, in which the widow was declared entitled to a certain sum, as the share of her deceased husband, "for her sole absolute use and benefit," it was held that the words were not to be interpreted as creating a separate estate in the widow; but that the deed

must be construed with reference to the situation of the parties and the rights of the widow by the Hindu Law; and that as she claimed and received the money as her husband's share in the joint-property, as his heiress and legal representative, the words meant only that the property was to be held by her in severalty from the joint estate, and that as a Hindu widow she took only a life-interest.—*Sreemutty Rabatty Dossee* v. *Sibchunder Mullick*, 6 *M. I. A.*, 1.

Where wool had been purchased by letter, the one party offering to purchase "*your wool* 16 *per stone*," and the other party accepting the offer, evidence was admitted as to the *quantity* of wool to which the contract applied. "It is quite clear," said Campbell, C. J., "from the letters which were put in at the trial that there was a contract between the parties. An offer was made and was accepted, and the only question is as to the subject-matter of the contract; I am clearly of opinion that when a specific thing is the subject of a written contract, and it is doubtful on the contract *what* that specific thing is, any fact may be given in evidence, in order to identify it, which was within the knowledge of both parties."—*Macdonald* v. *Longbottom*, 28 *L. J., Q. B.*, 293.

So also where a firm had employed a traveller to solicit custom for them over certain districts, and sued him, on a written contract, for travelling in other districts and soliciting business for other firms, evidence was admitted to show the meaning of the words "*your employ*" and "*the ground*" over which the defendant was to travel. Erle, C. J., said, "I am of opinion that the parol evidence is admissible, in order to *apply* the contract to the matter in question. It is not to vary or alter it: the parol evidence is admissible *to show the circumstances under which the words were used.*" Byles, J., observed—"The words 'are in consideration of my entering your employ.' It does not appear from the face of the document what the employment was. It does not appear what 'the ground' was. *The subject therefore requires to be identified*, the contract to be applied to some subject-matter: and that is just the case where parol evidence is admissible. It is the case of every day occurrence in the construction of a will."—*Mumford* v. *Gething*, 29 *L. J., C. P.*, 105.

So also, where there is a written contract to keep premises in repair, evidence may be given as to the condition, age, &c., of the premises in calculating the repairs contracted to be done.—*Payne* v. *Haine*, 16 *M. & W.*, 541. So, again, where delivery of goods or other performance is to take place within a "reasonable" time, evidence of the circumstances of the case is admissible to show what was reasonable.—*Ellis* v. *Thompson*, 3 *M. & W.*, 445. Extrinsic evidence is sometimes admissible for the purpose of showing that what is ostensibly recoverable on a document is not really recoverable. Thus, where Bills of Exchange were drawn against goods sold, and the bill of lading deposited as security that the Bills of Exchange should be duly such: on the bills being dishonored the holders sold the goods, and claimed against the defendant's estate the whole amount recoverable on the Bills of Exchange. Evidence was admitted to show the circumstances under which the Bills were given, and that the holders were entitled to claim only the balance due after sale of the goods.—*In re Shibchandra Mulik*, 8 *B. L. R.*, 30.]

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Exclusion of evidence to explain or amend ambiguous document.

Illustrations.

(*a.*) A agrees in writing to sell a horse to B for 'Rs. 1,000 or Rs. 1,500.

Evidence cannot be given to show which price was to be given.

(*b.*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

[This section will not have the effect of excluding evidence to explain abbreviations, illegible words, obsolete or provincial expressions, &c., which may in one sense be said to be "ambiguous or defective language," as to which, see Section 98. It applies to cases (1) in which either no meaning at all has been expressed, the sentence having been left unfinished, as *e. g.*, where there is a "grant of————to A" or a "grant of Blackacre to————;" or (2) where, though the language is intelligible, it is such as to give rise to a plain and obvious uncertainty of meaning, as when, *e. g.*, a man contracts to sell "one of my horses" or "a horse for Rs. 1,000 or Rs. 1,500." Here, as the language expresses no definite meaning, to bring in evidence as to what the intention of the person using it was, would be, not to interpret words, but to conjecture as to intentions, and this the section forbids.

"An agreement is not to be deemed unintelligible because of some error, omission or mistake in drawing it up if the real nature of the mistake can be shown so as to make the bargain intelligible. Thus, in *Coles* v. *Halme*, a bond to pay 7770 was allowed to be corrected by adding the word "pounds," the recital in the condition showing that that must have been the meaning of the parties."—*Benj.*, 38.

Evidence may be given to show that language, apparently ambiguous, is not ambiguous when taken in connection with the facts to which it refers. Thus in the case of a legacy to "one of the children of A by her late husband B," evidence would be admissible to show that A had only one son by B, and that this fact was known to the testator, and thus that the expression, though apparently ambiguous, was not really so, since it did sufficiently identify the object of the legacy; if, however, A had more than one child by B, the meaning would be ambiguous and evidence of the intention of the testator would be inadmissible.—*Broom, L. M.*, 473.

When a Bill of Exchange purported, in the body of it, to be drawn for two hundred pounds, but the figures at the top were £245, and the stamp was for the larger amount; Held that evidence of the intention of the parties to draw the bill for the larger amount was inadmissible, and that the sum mentioned in words in the body of the bill must be taken as that for which the bill was drawn.—*Sanderson* v. *Piper*, 7 *Scott*, 408.

"The question whether language is ambiguous must depend mainly upon this whether it is ambiguous when addressed to a person competent to interpret language. Words cannot be ambiguous, because they are unintelligible to a man who cannot read, and, within the same reason, words cannot be ambiguous merely because the Court, which is called upon to explain them, may be ignorant of a particular fact, science or art which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used..... It must, therefore, it is conceived, be admitted that a Judge is not competent to explain a testator's words, unless he has cognizance of those extrinsic facts, with reference to which a testator expressed himself: and, consequently, that when the meaning of the words, aided by the light derived from the circumstances of the case, is certain there an ambiguity cannot with truth or propriety be said to exist."—*Wigram*, 105.]

Exclusion of evidence against application of document to existing facts.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to B by deed 'my estate at Rampore containing 100 bígás.' A has an estate at Rampore containing 100 bígás. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

[The rule as laid down by V. C. Wood as to Wills is that "when any subject is discovered which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop; you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator, and are not permitted to go any further."—*Webb.* v. *Byng.*, 1 *Kay* and *Johns.*, 580.

But this does not have the effect of excluding evidence to explain the meaning of language which, though apparently plain, is really used in a technical or peculiar sense. See note to Section 98.]

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to B by deed 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

[Thus, where a written contract, dated October 24th, purported to indemnify against a bill, described as payable three months from that date: evidence was admitted to show that there was such a bill as described, but dated October 25th, and that that was the bill to which the indemnity was intended to apply, notwithstanding the discrepancy in date.—*Way* v. *Hearne*, 32 *L. J., C. P.*, 34.

Under this section, it is apprehended, evidence will be admissible, in cases of inaccurate descriptions of specific things or persons, to show who or what the thing or person, so inaccurately described, really is. In the case of Wills, (to which when made under Act X of 1865, these Sections do not apply) the English Courts have gone great lengths in carrying out the intentions of the Testator, when a person or thing, inaccurately described, can be ascertained from extraneous circumstances. The same principle would, under this section, be applied to deeds and instruments other than Wills regulated by the Indian Succession Act, and some examples of its application from the English decisions may be useful. Thus a legacy given to Catharine Earnley was claimed by Gertrude Yardley, and awarded to her on its being shown that no such person as Catharine Earnley was known to the testator, that the testator was in the habit of calling the claimant Gatty, which might easily have been mistaken by the person who drew the Will for Katy, and on other evidence showing that Gertrude Yardley was the person really meant: in the same way a legacy to Mrs. and Miss Bowden of Hammersmith, widow and daughter of the late Revd. Mr. Bowden," was claimed by Mrs. Washbourne and her daughter, on its being shown that Mrs. Washbourne was daughter of Mr. Bowden, that Mrs. Bowden had been dead for many years and that since her death no one of the name had resided at Hammersmith, and that the testatrix had been in the habit of confounding the names of the two families, and was in the habit of calling Mrs. Washbourne by her maiden name.

So again a devise to the second son of *Edmund* Weld of Lulworth was awarded to the second son of *Joseph* Weld of Lulworth on proof that the testator had been in the habit of calling the possessor of Lulworth " Edmund."

Wherever under this and the following sections evidence is admissible to explain a document, oral statements of the person making the document are admissible, and it matters not whether those statements are prior to, contemporaneous with, or subsequent to the making of the document. " They may of course have more or less weight according to the time and circumstances under which they were made: but their admissibility depends entirely on other considerations."—*Allen* v. *Allen*, 12 *A. & E.*, 451.

It has sometimes been contended that where a person or thing is *named*, and an inaccurate description is added, the *name* shall invariably prevail as against the description. There is, however, nothing to sanction such a view. " I think," says Lord Campbell speaking of such cases, " that there is no presumption in favor of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the bar, it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed."—*Drake* v. *Drake*, 8 *H. L. C.*, 17.]

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Evidence as to application of language which can apply to one only of several persons.

Illustrations.

(a.) A agrees to sell to B for Rs. 1,000 "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(b.) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Deccan or Hyderabad in Scind was meant.

[This will include statements by the person using the language, as, by Section 3, "that a man said certain words is a fact." See also note to Section 95.]

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

Illustration.

A agrees to sell to B 'my land at X in the occupation of Y.' A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

[According to the English Law, in cases such as these, although extrinsic evidence of the surrounding circumstances may be received, for the purpose of ascertaining to which set of facts the language refers, *evidence of the author's declarations of intention is inadmissible.—Tayl.*, § 1109. This distinction is not, apparently, preserved in the present Act.

This rule of construction was carried a great length, in its application to Wills, in an English case. A devise was made to the testator's nephew for life, remainder over to "Elizabeth Abbott, a natural daughter of Elizabeth Abbott of Gollingham, single woman, who had formerly lived in his service." Elizabeth Abbott, the mother, had, at the date of the Will, two children, a natural *son* of whom the testator's nephew was supposed to be the father, and a legitimate daugh-

ter. The natural son was held entitled under the devise, though neither sex nor name applied to him.—*Ryan* v. *Hannam*, 10 *Beav.*, 536. So a devise "to my dear wife Caroline" by a man, who had gone through a ceremony of marriage with a person named Caroline in the lifetime of his real wife, was held to pass the devised property to the person named Caroline.—*Doe* v. *Rouse*, 5 *C. B.*, 422; *Tayl.*, § 1102.]

Evidence as to meaning of illegible characters, &c.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations(1) and of words used in a peculiar sense.(2)

Illustration.

A, a sculptor, agrees to sell to B 'all my mods.' A has both models and modelling tools. Evidence may be given to show which he meant to sell.

[(1) When an expression used in a document has a technical meaning, parol evidence may be given to show that it is used in its technical and not in its ordinary meaning in common parlance, although it may be perfectly clear and unambiguous in itself. So when the lessee of a mine covenanted to get the whole of the mine "not deeper than the level of the mine at a particular point" parol evidence was admitted to show that amongst miners "level" had a technical meaning different from the ordinary signification of horizontal line.—*Clayton* v. *Greyson*, 5, *A. & E.*, 302.

So in a memorandum about a horse race, evidence was admitted to show that the words "across country" meant that the riders were to jump the obstacles and not go through gates.—*Evans* v. *Pratt*, 3 *M. & G.*, 759.

So also evidence has been admitted to show that by usage of the Hop-trade "ten packets of Kent hops at £5," means at "5£ per cwt.," that "months" in a Charter-party means "calendar months," and that "days" in a bill of lading means "working days;" and in the same way special technical meanings have been proved in the case of the phrases "duly honored," as to a Bill; "in turn to deliver" in a Charter-party, "weekly accounts" as meaning, in a certain trade, accounts of particular work *only*; a "bale of cotton" as meaning a "bag" in the Alexandrian Trade, and a compressed bale in the Calcutta Trade.—*Tayl.*, § 1062. So, where in a lease as to a rabbit-warren, the lessee covenanted to leave 10,000 at the expiration of the lease, evidence was admitted to show that according to local usage 1,000 meant 1,200 when applied to rabbits.—3 *B. & A.*, 728.

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract.—*Bourne* v. *Gatliff*, 11 *C. & F.*, 45.

(2) Thus evidence was admitted to show the meaning of the letters P. P., at the end of a bet, viz., Play or Pay, that is to say, run the match or pay the bet.—*Daintree* v. *Hutchinson*, 10 *M. and W.*, 85. And

so where a legacy was left to "Mrs. G.," evidence was admitted to show that the testator was in the habit of calling a certain person "Mrs. G.," and she was allowed to take under the initial.]

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C if it affected his interests.

Saving of provisions of Indian Succession Act relating to wills.

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

[These are contained in Ch. XI. Act XXI of 1870 extends parts of Act X of 1865 and amongst others Chapter XI, Sections 61—77 and Sections 82, 83, 85, 88—103 inclusive, to the Wills of Hindus, Jainas, Sikhs and Buddhists in Lower Bengal and the Towns of Madras and Bombay. It is, therefore, only to Wills other than these that the provisions of the present Act apply.]

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.—OF THE BURDEN OF PROOF.

Burden of proof.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

(a.) A desires a Court to give judgment that B shall be punished for A's crime which A says B has committed.

A must prove that B has committed the crime.

(b.) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

On whom burden of proof lies.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.

(a.) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(*b.*) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

[Where execution of a deed is admitted, but defendant denies having received consideration, the burthen of disproving such receipt lies on the defendant.—*Sivara Maiyar* v. *Samu Ayar*, 1 *M. H. C. R.*, 447. So, also, where in a summary proceeding between persons claiming to be coheirs a defendant had been adjudged a coheir, the burthen of proving his illegitimacy lies on the plaintiff's coheirs.—*Ashrufood Dowlah* v. *Hyder Hossain Khan*, 11 *M. I. A.*, 109. So, again, where a ryot digs a tank on his landlord's ground, the burthen of proving a customary or other right to do so lies on the ryot.—*Tarini Charan Bose* v. *Debnavayan*, 8 *B. L. R.*, *Ap.*, 69.]

Burden of proof as to particular fact.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

(*a.*) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

[Where property is purchased in name of a benamidar, and all the indsera of property are placed in his hands, and the true owner wants to get rid of the effect of an alienation by the benamidar, the *onus* lies on him to show that (1) the alienation was made without his acquiescence, and (2) that the purchaser took with notice of that fact. —*Bhugwan Das* v. *Assook Singh*, 10 *Suth., C. R.*, 185.

As to the burthen of proof respecting the genuineness of an altered document, see note to Section 62. The burthen of showing that an alteration which appears on the face of a bill was made under such circumstances as not to vitate it lies on the plaintiff.—*Byles on Bills, 8th Edition*, p. 304.

Where an application is made under Section 201, Criminal Procedure Code, for attachment of a debtor's person, the *onus* is on the debtor to show that he has no property, not on the creditor to show that by sending the debtor to prison some advantage will be gained.—8 *B. L. R.*, 255.

Under Section 9 of Act XXVII of 1871 (Criminal Tribes) a member of a Criminal Tribe has the burthen of proving "lawful excuse" in certain cases thrown upon him.

The *onus* of showing that a compromise has been fraudulently obtained by intimidation and false representation, is cast upon those who seek to impeach the validity of their own deed.—*Rajunder Narain Rae* v. *Bijai Govind Sing*, 2 *M. I. A.*, 521.]

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(a.) A wishes to prove a dying declaration by B. A must prove B's death.

(b.) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Burden of proving that case of accused comes within exceptions.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations.

(*a.*) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(*b.*) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(*c.*) Section three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by section three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grevious hurt under section three hundred and twenty-five.

The burden of proving the circumstances bringing the case under section three hundred and thirty-five lies on A.

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations.

(*a.*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b.*) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[Mr. Taylor mentions, (as an exception to the rule that "the burthen of proof lies on him who substantially asserts the affirmation of the issue,") the rule that "when the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favor."—*Tayl.*, § 347. But the present section will not, it is submitted, relieve the plaintiff from the necessity of making out his case, unless the fact in question be *so especially* within the defendants' knowledge that he alone can be expected to know about it. Thus, where A sued to recover land of B, and B admitted that the tenure of certain lands, which he formerly held, had passed to the plaintiffs, but denied that the particular land in question formed part of the tenure, Markby, J., held that the burthen of proving that the lands in question did form part of the tenure was on the plaintiff; the learned Judge, in considering the English cases on the subject, expresses an opinion that Mr. Taylor's statement of the law (§ 347) is scarcely borne out by the decisions; and he quotes a ruling of Lord Denman, C. J., in support of his opinion. In that case plaintiff alleged that the defendant had hired a house from him and had covenanted to keep the house insured, and had failed to insure. The plaintiff proved the lease and the covenant, but not the failure to insure: and it was contended that the *onus* of proving that he had insured lay on the defendant: Lord Denman, however, considered that the plaintiff was bound to prove the breach.—*Doe. d. Bridger* v. *Whitehead*, 8 *A. & E.*, 571. Under the present section, the fact of an insurance being so especially within the defendant's knowledge that the plaintiff could not be

expected to know about it, it is apprehended that the burthen of proof would, in such a case, lie on the defendant.—*Ghidhar Hari* v. *Kali Kant Roz Chowdri*, 3 *B. L. R.*, 163.

In an action for penalties against the proprietor of a theatre for performing a drama without the consent of the author, the *onus* of proving consent lies on the defendant.—*Morton* v. *Copeland*, 24 *L. J.*, *C. P.*, 169.

So, in an action against an apothecary for practising without a certificate, the apothecary must prove his certificate.—*The Apothecaries' Company* v. *Bentley*, *Ry. & Mood.*, 159.

So, in the case of proceedings for sporting without a license.—*R.* v. *Turner*, 5 *M. & S.*, 206.

But where there was covenant by a lessee "not to permit a sale by auction on the premises," and the lessee underlet and the undertenant assigned his goods to certain persons who sold them by auction on the premises, it was held in the Exchequer Chamber that the burthen of proving the lessee's assent lay on the plaintiff and that in the absence of proof of this he was rightly non-suited.—*Toleman* v. *Portbury*, *L. R.*, 5 *Q. B.*, 288.]

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

[The Hindu Law presumed the death of a person of whom nothing has been heard for 12 years, or, at Benares, 15 years; the Mahomedan Law presumed the death of a missing person ninety years after his birth, though he had been seen last within 5 years.

These provisions are now over-ruled.]

Burden of proving that person is alive who has not been heard of for seven years.

108. [*Provided that] when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

Burden of proof as to partnership, tenancy and agency.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not

* Added by Act XVIII of 1872.

stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

[When a Hindu family is admitted to have been at one time joint, the burthen of proving it to be divided is on the person asserting it.—1 *S. W. R.*, 316.]

Burden of proof as to ownership.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

[The possession, in order to fall under this section must be shown to be something more than the mere violent seizure and occupation by a wrong doer; a man could not walk into another man's house, turn him violently out, and then throw upon him the burthen of proving himself the owner. On the same principle it has been held that mere possession as a trespasser is not sufficient to entitle a plaintiff to recover in a suit brought under Section 15 of Act XIV of 1859. There must be in the plaintiff juridical, as opposed to mere physical, possession.—*Dádábhái Narsidás, The Sub-Collector of Broach*, VII, Bomb. H. C. Reports, A. C. J., p. 82. See also *Sutherland* v. *Crowdy*, 18 *S. W. R., Cr. R.* 11, in which Couch, C. J., discusses the meaning of the word "possession" as used in Section 530 of the Code of Criminal Procedure, and quotes Domat's Civil Law, Section 2122 in support of his view that it must be taken to include, not only actual manual possession, but the possession of a master by his servant, of a landlord by his immediate tenant, of the person who has the property of the land by the usufructuary. An usufructuary would, of course, be a person in possession within the meaning of the present section.

But possession, other than the forcible possession of a wrong-doer, frequently has the effect of dispensing with any other proof of title. Thus in an action on a policy of insurance effected on a ship and her cargo, the plaintiff may rely on the mere fact of possession, without the aid of any documentary proof or title deeds, unless such further proof be rendered necessary by the opposite party adducing some contrary evidence.—*Tayl.*, § 108. So, a finder or bailee of goods may sue for wrongful retainer.

As to the acquisition of absolute ownership by possession, see the Limitation Act, 1871, Section 27. For the procedure to be followed by the Magistrate in cases of dispute concerning land, houses, produce of land, &c., see Cr. Pr. C., Chapter XL, Sections 530—535. Section 15 of Act XIV of 1859, provides that if any person has been dispossessed of immoveable property otherwise than by due course of law, he will, in a suit to recover possession, be entitled to a decree for possession, notwithstanding any other title that may be set up. Such a suit must be brought within six months and does not bar further proceedings to establish the title.]

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Proof of good faith in transactions where one party is in relation of active confidence.

Illustrations.

(*a.*) The good faith of a sale by a client to an attorney, is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b.*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

[This principle is applied by the English Courts to transactions between medical practitioners and their patients, spiritual advisers and members of their congregations, trustees and their *cestuis-que-trust*, guardians and wards. The Courts also regard with the utmost suspicion dealings on the part of heirs with their expectancies. An Indian Court would, no doubt, act properly, in such cases, in throwing upon the other party the burthen of proving the fairness of the transaction.

It must be observed that the rule laid down by this section applies only in transactions between the parties; thus where A, on attaining majority, sued to set aside a compromise effected by his guardian in a suit against the guardian on account of debts of A's father, on the ground that the compromise was collusive, it was held that the burthen of proof lay on A to show collusion and fraud, and that in absence of proof, the suit must be dismissed.—*Lekraj Roy* v. *Mehtab Chund and others*, Priv. Coun. Mad. Jurist, May 1872.

Where a Manager of an infant's ancestral Estate has charged it by way of loan or mortgage, no general rule as to the burthen of proving the *bonâ fides* of the Manager can be laid down: it varies with the circumstances of the case, and must be regulated by them. The *onus* of disproving *bonâ fides* will not in every case be upon the person endeavoring to set the deed aside. Thus, where a mortgagee is setting up a charge made in his own favor by one whose power he knew to be limited and qualified, he may reasonably be expected to allege and prove facts presumably better known to him than to the infant heir, viz., those facts which embody the representations made to him of the alleged need of the Estate and the motives influencing his immediate loan.—*Hanooman Persad Pandy* v. *Mt. Manraj Koonwaree*, 6 *M. I. A.*, 419. But as between the Manager and the infant the *onus* of proving *bonâ fides* would, under the present section, lie, in every case, on the Manager.

In a suit by a wife, a Mahummadan woman, against her husband to recover the value of Company's paper, real and personal estate, the plaint alleged, that such paper being her separate property, had been, as she lived in seclusion, indorsed and handed over by her to her

husband for the purpose of receiving the interest thereon. The defence of the husband was, that he had purchased such paper from his wife, and on the indorsement and delivery, had paid the full value to his wife, who had appropriated the proceeds to her own use. It was held upon a review of the evidence, that, although the wife failed to prove affirmatively, the precise case alleged by her in the plaint, the husband was bound to show something more than the mere indorsement and delivery of the Company's paper, and that from the relation subsisting between the parties the *onus probandi* was upon him to establish; first, that the transaction which he set up was a *bonâ fide* sale; and second, that he gave full value for the Company's paper so received from his wife; it was further held that in the absence of proof of the husband having the means of purchasing the Company's paper, he being at the time in embarrassed circumstances, and the condition of the wife, a secluded woman, that no purchase had taken place, and that the transaction was fraudulent as against her.—*Moonshee Bazloor Raheem* v. *Shumsoonissa Begum*, 11 *M. I. A.*, 551.]

Birth during marriage, conclusive proof of legitimacy.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

["Non-access" means "non-existence of sexual intercourse," not merely non-residence in the same house: accordingly it would be open to a person wishing to prove the illegitimacy of a child to show either that the husband was impotent, or that the husband and wife had never met under such circumstances as would admit of sexual intercourse.

According to English law "when the legitimacy of a child is the question in dispute, the testimony of the parents, that they have or have not had connexion, has, on the same general ground of decency, morality, and policy, been uniformly rejected. This rule excludes, not only all direct questions respecting access, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause; and it applies to the depositions of the parents equally with their *vivâ voce* testimony." —*Tayl.*, § 868.

Under the present Act this provision does not appear to be preserved: but a husband or wife might be questioned as to whether they had access at any time when the child could have been begotten.

Such questions might in some cases fall within the scope of Section 151.

The present section, however, reproduces the English Law, so far as regards the rule, observed in English Courts, that where access is proved, the presumption of legitimacy cannot be rebutted by proof of adultery. The law will not allow a balance of evidence as to who was most likely the father of the child.—*Banbury Peerage Case*, 1 S. & S. 155.]

Proof of cession of territory.

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Court may presume existence of certain facts.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.(1)

Illustrations.

The Court may presume—

(*a.*) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ; (2)

(*b.*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars ; (3)

(*c.*) That a bill of exchange, accepted or endorsed, was accepted or endorsed, for good consideration ; (4)

(*d.*) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence ; (5)

(*e.*) That judicial and official acts have been regularly performed ; (6)

(*f.*) That the common course of business has been followed in particular cases ; (7)

(*g.*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it ; (8)

(*h.*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ; (9)

(*i.*) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged. (10)

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them :—

As to illustration (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

As to illustration (*b*)—A, a person of the highest character, is bribed for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

As to illustration (*b*)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

As to illustration (*c*)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence:

As to illustration (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

As to illustration (*e*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances:

As to illustration (*f*)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances:

As to illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

As to illustration (*h*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked:

As to illustration (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

[(1) The presumptions mentioned in Illustrations (*a*)—(*i*) are recognized by English Law; but they vary infinitely in cogency, and it depends, (as is shown in the second part of the Illustrations), on the particular circumstances of each case whether they have any cogency at all. The Court is, therefore, under the present section, left at liberty, in these and corresponding cases, to shift the burthen of proof as it thinks fit with reference to the probabilities of the case. It may either at once draw the inference, which the facts of the case, according to the ordinary course of human events, *primâ facie* suggest, and so throw the burthen of proof on the party who denies that inference; or it may, with reference to some such consideration as those mentioned in the second half of the Illustrations, refuse to draw the inference, and call for proof of it in the first instance from the person who asserts it.

In order to have regard to "the common course of natural events, human conduct and public and private business," the habits of the country, disposition and manners of the inhabitants, customs of trade, local usages, the general spirit and tendency of the existing law

will have to be taken into account, and the probabilities in each case thus arrived at. In India some of the most important presumptions are those raised in the case of the joint Hindu family. In such cases the presumption is that the *whole* property of the family is joint, and the *onus* lies upon a party claiming any part of such property, as his separate estate, to establish that fact.—*Gopeekrist Gosain* v. *Gunger Persad Gosain*, 6 *M. I. A.*, 53.

In the same case it was held that when a purchase of real estate is made by a Hindu in the name of one of his sons, the presumption of Hindu Law is in favor of its being a *benamee* purchase, and the burthen of proof lies on the party, in whose name it was purchased, to show that he was solely entitled to the legal and beneficial interest in it. The fact of the person, in whose name the estate was purchased, being the real purchaser's son does not alter the presumption, as the English presumption of advancement will not apply in such a case, though the instrument is in an English form. When, however, one member of a Hindu joint family claims a share of property, purchased by another member, on the ground that it was purchased from joint funds, the Court held that, before it could be presumed from the fact of the members having lived in commensality, that the property was purchased from joint funds, the plaintiff was bound to show that these were joint funds, or other ancestral property from which such funds could be derived.—*Khelat Chunder Ghose* v. *Koonj Lall Dhur.*, 10 *Suth. W. R.*, 329. Commensality alone is not enough to raise a presumption that property is joint; the existence of joint funds, out of which the property might have been purchased, must also be shown. See the cases collected by Mr. Norton in the case *Luximon Row Sadasew* v. *Mullar Row Bajee*, 1 *Norton L. C.*, 191.

In cases where there has been a sale of ancestral property, the question as to the burthen of proving the necessity of the sale has been much discussed. In the case *Hanoonan Persad Pandy* v. *Mt. Babooee Munraj Coonwaree*, (6 *M. I. A.*, 393) it was laid down that the purchaser does not in such cases take upon himself the entire risk of the existence of a case of necessity for alienation. The purchaser "is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with whom he is dealing, that the manager is acting in the particular instance for the benefit of the Estate. The question on whom the burthen of proof lies in such suits is, their Lordships observe, not one capable of a general and inflexible answer; the presumption proper to be made will vary with the circumstances and must be regulated by, and be dependant upon them."

In *Modho Dhyal Singh* v. *Goshar Singh*, 9 *Suth. C. R.*, 511, the Judges laid down that where a son, under the Mitakshara Law, sets aside a sale by his father on the ground that it was unnecessary and that he had never acquiesced, but the purchaser claims a refund of the purchase money on the ground that it went to the credit of the joint estate, or was applied to removing an incumbrance binding on the heir, the burthen of proving such application lies on the purchaser. "It appears to me," said Peacock, C. J., "that the *onus* lies on the defendant (*i. e.*, the purchaser) to show that the purchase money was so applied. I do not concur in the decision which has been referred to from 2, Wyman's Reporter, p. 81, (*Muddun Gopal*

Thakoor v. *Ram Buksh Pandee and others*) in which it is said that in the absence of evidence to the contrary it must be assumed that the price received by the father became a part of the assets of the joint family: if the father was not entitled to raise the money by sale of the estate, and the son is entitled to set aside that sale, the *onus* lies on the person, who contends that the son is bound to refund the purchase money before he can recover the estate, to show that the son had the benefit of his share of that purchase money."

As to the presumption of agency in the case of a Hindu wife, so as to make her contracts binding upon the husband, see 1 *Norton L. C.*, 9.

The presumption of law is, that the whole of the property of an undivided Hindoo family is in coparcenary. The *onus* lies on a member of such family to prove that it was separately acquired.—*Dhurm Das Pandry* v. *Mussumat Shama Soondri Diviah*, 3 *M. I. A.*, 501.

A debt incurred by the head of a Hindu family residing together is, under ordinary circumstances, presumed to be a family debt: but where one of the members is a minor, the creditor, seeking to enforce his claim against family property, must show that the debt was incurred *bonâ fide*, and for the good of the family.—*Tandavaraya Mudali* v. *Valli Ammal*, 1 *M. H. C. R.*, 398.

Where an estate was originally ancestral, belonging to a joint and undivided Hindu family, the presumption of law that a family once joint retains that status can only be rebutted by evidence of partition, or acts of separation: and the *onus probandi* lies on the party who claims a share in such estate to prove that it is a divided family.—*Mt. Cheetha* v. *Miheen Lal*, 11 *M. I. A.*, 369.

Where a Hindu family came from one part of India, attended by priests of its own persuasion, and settled in another, the presumption is that it would carry with it its own usages and school of Hindu Law: and the *onus* of proving an interruption or cessation of such a state of things would lie on the person asserting that such an interruption or cessation had taken place.—1 *B. L. R., P. C.*, 33.

Hindu families are governed ordinarily by the law of their origin and not by that of their domicile. In the case of a Mitakshara family residing in Bengal the presumption would be in favor of its being governed by Mitakshara law till the contrary was proved.—12 *M. I. A.*, 81.

There is no presumption of authority to pledge the husband's credit in the case of a Hindu wife, living apart from her husband on account of his marriage to a second wife, or for any other insufficient reason. —*Verasami Chetti* v. *Appasami Chetti*, 1 *M. H. C. R.*, 379.

Where an impartible Raj, which had descended for generations according to the rule of primogeniture, was confiscated for rebellion of the reigning Rajah, and twenty years afterwards granted to C, a younger member of the Rajah's family, it was held that though the Zemindary must be regarded as the acquired property of C, yet that, in the absence of evidence of an intention to the contrary, the intention of Government must be taken to have been to restore the estate as it existed before confiscation, and that the grant to C was not the crea-

tion of a new tenure, but simply a change of tenant by *vis major*.—*Baboo Bûr Pertab* v. *M. Rajender Pertab*, 12 *M. I. A.*, 1.

The plaintiff sought to make two purdah ladies liable on a document which he alleged had been executed by a third person as their agent. It was held by the Privy Council (reversing the decision of the High Court), that strict proof of the agency must be given.—*Mussumat Azeezoonnissa and another* v. *Baqur Khan*, 10 *B. L. R.*, *P. C.*, 205.

In the absence of express contract, Mahummadan Dower is presumed to be prompt, demandable at any time, not merely deferred, *i. e.*, demandable on divorce.—*Tadya* v. *Hasanebyari*, 6 *M. H. C. R.*, 12.

Where a son purchases property, which his father had mortgaged and the mortgagee had foreclosed, this does not by itself raise such a presumption of benamee as the Court can act on, the other circumstances of the case going to show that the purchase was a *bonâ fide* one on the part of the son.—*Faez Bax Chowdry* v. *Fakirudin Mahomed Chowdry*, 9 *B. L. R.*, 457.

"It is, however, perfectly clear that, in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in *India* as much among Mahomedans as among Hindoos, and the judgment in *Gopeekrist Gosain* v. *Gunger Persad Gosain*, and the cases therein referred to are, at all events, authority for the propositions that the criterion of these cases in *India* is to consider from what source the purchase money comes; that the presumption is, that purchase made with the money of A, in the name of B, is for the benefit of A; and that, from the purchase by a Father, whether Mahummadan or Hindoo, in the name of his son, you are not at liberty to draw the presumption, which the English law would draw, of an advancement in favour of that son. Again, the mere fact that this property was purchased, not in the sole name of the son, but in the name of the wife as well as of the son, affords a strong argument in favour of the hypothesis that it was a *Benamee* purchase; for there was no such community of interest between the wife and the son as would render it probable that they had been made joint owners of the property; and the reason for putting two names, rather than one, into a trust applies almost as strongly in *India* as it would in this country."—*Moolvie Syud Uzhur* v. *Mt. Beebee Ultaf*, 13 *M. I. A.*, 246.

As to the presumption of advancement arising under English Law in the case of a purchase by a father in a son's name, the Court said, in *Stock* v. *McAvoy*, *L. R.* 15 *E.C.*, 59, that the strong presumption is that the son is not a trustee, and that this can only be displaced by evidence: any act of taking possession by the father is sufficient to displace it: in this case, for instance, the father called on the tenant, and gave her notice to quit, but afterwards allowed her to remain; this fact, coupled with receipt of the rents during his life by the father, was held sufficient to show that the son was a mere trustee for the father.

The presumption as to a child's religion was thus stated by the Privy Council in *Skinner* v. *Orde*, 7 *M. J.*, 150. "From the very necessity of the case a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and religious status." Accordingly the Committee confirmed the order removing the child from the custody of her mother, who

had turned Mahummadan and gone through the ceremony of marriage with a married Christian who had turned Mahummadan in order to practice polygamy, and ordered her to be entrusted to a guardian to be brought up in her father's religion, though she professed herself a Mahummadan.

The presumption as to marriage and legitimacy was discussed by the Judicial Committee in *Ramamami Ummal* v. *Kalanthar Natchiar*, 7 *M. J.*, 83. In that case a ceremony of marriage had been gone through between a Sudra Zamindar and the 1st plaintiff, who alleged herself to be of the Vellala caste, but whom the defendants alleged to be a dancing girl: the Privy Council inferred that she was *not* a dancing girl, as, in that case, the ceremony would have been not only invalid but, from a Hindu point of view, profane; their Lordships also relied on the treatment which the 2nd plaintiff, the son of the first plaintiff, had received at the hands of the Zamindar. It being shown that he was treated by the Zamindar as legitimate, the burthen of showing that he was not legitimate was thrown upon the defendants.

According to Mahomedan Law while a marriage lasts, a child of the woman is taken to be the husband's: an ante-nuptial child is illegitimate, but may become legitimatized by force of an acknowledgment, express or implied, directly proved or presumed. The question for the Court in such a case is whether the treatment of the child furnishes evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favor of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to over-ride over-balancing proofs, whether direct or presumptive.

In *Khajah Hidayat Oollah* v. *Rhai Jankhanum*, 3 *M. I. A.* 295, there was, their Lordships held, "a consecutive course of treatment both of mother and child for a period between seven and eight years under circumstances in which it appeared to their Lordships next to impossible that it would have been continued except from the presumption of cohabitation and of the son being the issue of the loins of Fyz Ali Khan:"—this their Lordships held tantamount to an acknowledgment that such was the case.

In *Ashrufah Dowlah Ahmed Hosain* v. *Hyder Hosain Khan*, 11 *M. I. A.*, 94, the same question arose, coupled with the additional circumstance that the alleged father, after treating the child for some years as his legitimate son, had afterwards turned him out and executed a deed of renunciation whereby he declared that he was not his son. On the whole their Lordships decided that the child's legitimacy was not proved. "The case, then, said their Lordships, must be determined on the principles of evidence which are applicable to presumptive proof, every reasonable legal presumption being made in favor of legitimacy. The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision. The Courts have properly presumed in many cases both marriage and acknowledgment, for to presume acknowledgment and to consider treatment as tantamount to it is virtually the same. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject, and, whilst

matters of the highest import are capable of being inferred, and are inferred, from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation." In this case their Lordships observed; "In arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan Law, the law which regulates the rights of the parties before us, the legitimation or legitimacy of a child of Mahummadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof either of a marriage between the parents, or of any formal act of legitimization. Here, there is, to their Lordship's judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference."—11 *M. I. A.*, 108.

Mere continual cohabitation, therefore, does not suffice to raise a presumption of marriage so as to legitimize the offspring: the fact of a marriage taking place excludes any presumption which the facts might raise of a previous marriage having taken place.

A Mahummadan cohabited for many years with a Mahummadan woman who had been a prostitute and who lived in his house. At his death she claimed to be his wife, and called witnesses to prove an actual marriage, but which fact she failed to establish. Held, that the Court of last resort could not presume, in such circumstances, that a woman, once a concubine, had, merely by lapse of time and propriety of conduct, become a wife, and that the ordinary legal presumption was that there had been no marriage.—11 *M. I. A.*, 195.

Where a testamentary document showed a distinct intention on the part of the testator that he should be represented by his daughter's line, *should that line continue*, but made no provision for his representation in case of the failure of the daughter's line, it was held that the same reasons, which justify a presumption in favor of an authority to adopt in the absence of express permission, are powerful to exclude the presumption of a prohibition to adopt when, on a new and unforseen occasion, the religious duty arises: and that, a contingency having arisen for which the testator failed to provide, the widow's power to adopt must be regulated by the ordinary legal presumption.—*The Collector of Madura* v. *Mootoo Ramalinga*, 12 *M. I. A.*, 397.

In *Rajah Chundernath Roy Bahadar* v. *Koar Govindnath Roy and others*, 7 *M. J.*, 428, their Lordships, in the Privy Council, discussed several presumptions, which arose in the case, as to an authority to adopt, alleged to have been conferred on his wife, and authority to manage conferred on his mother, by the Rajah. The Rajah was shown to have been on ill terms with his mother, which suggested the inference that he would not confer such a power on her: but against this was put the consideration that it was natural that a revulsion of feeling should come over him as death approached and that he should desire reconciliation. Then it was argued, why should he entrust the management to his mother, whose management had so displeased him in his lifetime: to this it was replied that what had displeased him was her interference and her desire to manage, and that this was quite consistent with his thinking her the best person to manage after his death. Then the inference of invalidity arising from non-registration was shown not to

be a strong one: next the Committee discussed an inference, grounded on the fact that the adoption did not take place till six or seven years after the Rajah's death. This was explained by the fact the widow had a daughter, and that, if that daughter had married and had a son, that son might have performed the funereal rites: and though the widow might have neglected her duty in waiting so long, the stronger her duty to adopt, the less likely was it that the Rajah would leave her without the power to adopt.

As to the presumptions arising in the case of an adoption under a Will where the adoption had been acquiesced in for a long series of years, their Lordships in the Privy Council, in *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee*, 14 *M. I. A.*, 67, made the following remarks; "We, therefore, find that for a period of twenty-seven years this Will was, with the exceptions I have mentioned, acted upon and recognized by the whole of the family of Kalli Prosad Holdar, and that the legal status of the appellant was acquired under it with the knowledge of all the members of the family. If the document had been a fabrication, and if there were persons who might have intervened and have contested the Will, the presumptive heir, who was in existence before his title was defeated by the birth of the present contesting respondent, might have come forward in one way or another and contested the Will. Therefore, there arises, from all these circumstances, a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favour of the Will. No doubt, these circumstances, as the law stands, are not conclusive against the first respondent. He has the right to call upon the appellant, the defendant in the suit, to prove his title; but their Lordships cannot but feel that while he has the extreme right, every allowance that can be fairly made for the loss of evidence during this long period, by death or otherwise—every allowance which can account for any imperfection in the evidence—ought to be made; and, on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the Will and to the acts done by them under the Will. The case seems to their Lordships, to be analogous to one in which the legitimacy of a person in possession is questioned a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the defendant, in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindoo claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family, and it would be most unjust after a long lapse of time to deprive him of the status, which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title."

The fact that a Will was duly read over to a capable Testator, or otherwise brought to his notice, on the occasion of its execution,

coupled with his execution of it, is, in the absence of fraud, conclusive proof of his approval, as well as of his knowledge of the contents.—*Guardhouse* v. *Blackburn*, *L. R.*, 1 *Pr.*, 117.

There are various presumptions as to Wills which are recognized by the English Courts. Where unattested alterations appear on the face of a Will and no information can be given, and there are no circumstances to show when the alterations were made, the presumption is that they were made after the execution of the Will.—4 *Moo. P. C.*, 419.

Where a Will is executed in several separate sheets and the last only is attested, the presumption is that all the sheets were in the room at the time of attestation.—*Williams' Executors*, 84—85; *Stokes' Indian Succession Act*, 32. As to alterations the general presumption is that, when alterations are in pencil, they are deliberative, when in ink that they are real and conclusive.—*Ibid.* 27. So the destruction or mutilation of a Will raises a presumption of the revocation of a codicil; but this may be rebutted by showing that the testator intended the codicil to operate, notwithstanding the revocation of the Will.—*Williams on Exors.*, 135. So the destruction of one of two duplicate Wills is presumed to be a revocation of both. A Will found mutilated in a testator's custody is presumed to have been mutilated by himself; and if a testator has a Will in his custody, and it cannot be found after his death the presumption is that he destroyed it himself.—*Stokes*, 40.

Where a plaintiff fails to make out his case, the presumption will be in favor of the defendant; thus, *e. g.*, in an action for money lent, the only evidence was that plaintiff handed defendant a bank note, the amount of which did not appear. The Jury was directed to presume the note to have been one for £5, that being the smallest in circulation.—*Lawton* v. *Sweeney*, 8 *Jur.*, 964.

In actions or prosecutions for negligence, the mere fact of injury having been occasioned is not enough to throw the burthen of disproving negligence on the defendants: as *e. g.*, if a person sues for injuries inflicted by a carriage in the streets, he must show that the accident arose from the defendant's negligent driving. An accident, however, may occur under circumstances which throw the burthen of disproving negligence on the defendant in the first instance: as *e. g.*, where a barrel was let fall from a window on the plaintiff as he was walking in the streets.—33 *L. J.*, *Ex.*, 13.

"The Court of Admiralty recognizes certain presumptions, which ought to be borne in mind, as they have the effect of technically shifting the burthen of proof. Thus, in cases of collision, if one of the vessels be shown to have been at anchor, that fact so far raises a presumption in her favour, as to impose on the other vessel the necessity of making out her defence. So, if a ship be proved to have been in stays at the time of the collision, she is presumed to have been unable to avoid it; and the burthen of proof rests on the opposite side to establish, either that the vessel was improperly put in stays, or that the damage was occasioned by stress of weather, or by other unavoidable accident. Again, if a salvor's vessel has been injured or lost while engaged in the salvage service, the Court of Admiralty presumes, *primâ facie*, that such injury or loss was caused

by the necessities of the service, and not by the salvor's default."—*Tayl.*, § 162*A*.

Sanity is presumed, but insanity once proved, the burthen lies on assertion of lucid interval to prove it.

There is a presumption in the Punjab that, in Regular Settlements made before 1st June 1872, all forests, unclaimed, unoccupied, deserted or waste lands, quarries, spontaneous produce and other accessory interests in land (whether included within the boundaries of an estate or not) belong to Government, unless provision is expressly made to the contrary. See Act XXXIII of 1871, Section 38. The section further points out how this presumption may be defeated.

The fact of a vendor, consigning goods, making a bill of lading deliverable to the order of the vendor, is *primâ facie* evidence of his intention to preserve his *jus disponendi*, and to prevent the ownership passing to the purchaser. This presumption, however, may be rebutted by showing that the vendor in making the Bill of Lading payable to his order, did so as agent for the vendor, and did not intend to retain control of the property.—*Benj.*, 289.

A strong inference is often to be drawn against a party who does not come forward as a witness, *e. g.* in *Rughoobar Dutt Chowdry* v. *Narain Chowdry*, 7 *M. J.*, 345, the plaintiffs proved the execution of a bond by their own evidence and that of five attesting witnesses. Against this the defendants set up a counter case of forgery, supporting it by hearsay and untrustworthy evidence, but not directly contradicting the plaintiff, and not venturing themselves into the witness box, to deny the signature. The original Court found for plaintiff, but the High Court reversed the decision: the decision of the High Court was reversed by the Judicial Committee.

As to the presumption in the case of letters shown to have been entered in due course in a letter, receipt or despatch book, see Section 16 and note to Illustration *(b)*. The question of the weight to be attached to the fact that a letter was posted as evidence of its having been received was recently discussed in *The Imperial Loan Company of Marseilles*, *L. R.*, 15, *E. C.*, 18, it was proved that the letter was despatched and that other letters similarly sent arrived duly, and the Court held that the unsupported statement of the addressee, denying its receipt, was not sufficient to get rid of the strong presumption that the letter had arrived at its destination. There was some evidence of unbusiness-like conduct on the part of the addressee, and also of his having been in a confused state of mind, and the Court, accordingly, though not disputing his respectability, found that the letter had been received. In India the presumption would, perhaps, be scarcely so strong.

Where it is shown in cases of suits on bills of exchange by defendants' evidence that a bill was originally infected with fraud or illegality, then the title of the original holder and that of every other holder which reposes on his title being destroyed, the burthen lies on the plaintiff to show that he or some person, under whom he claims, gave value for the bill. But when the question is whether the plaintiff, the transferee *had notice* of the original illegality or fraud, and the plaintiff has shown that he gave value, then if the defendant wants to impeach plaintiff's title by alleging notice of fraud or illegality, it is for defendant to prove it.—*Byles*, 113.

Where a document is required by law to be stamped *at the time when it is received by the holder*, and the document is produced in Court duly stamped, the presumption is that it was duly stamped when received, and the *onus* is on the other party to show that it was not.—*Bradlaugh* v. *DeRin*, 37 *L. J.*, *C. P.*, 146.

There are numerous so called "presumptions" which are merely laws under another form: *e. g.*, the presumption that every one knows the law is only another way of enacting that no one shall be excused for ignorance of the law; the presumption that every one contemplates the natural effects of his own acts is tantamount to an enactment that the Law does not care what a man may have contemplated, but will punish him for what he does. Frequently 'presumptions' may be seen turned into Statutory Law: for instance, there are certain presumptions in English Law as to a testator's intentions, where he has made two bequests to the same person; these are to a great extent repeated in the Indian Succession Act, Section 88, without any reference to a presumption. In the same way Laws of Limitation sometimes appear as presumptions that a claim, not put forward for a certain period, has been satisfied: and title by prescription, which is generally described as resting on the presumption of an ancient grant, is provided for by a specific enactment in Act IX of 1871, Section 28.

Very many statutory presumptions belong, accordingly, not to the Law of Evidence, but to the ordinary substantive law on the subjects with which they are connected. There is a certain presumption as to desertion, for instance, provided by the Native Articles of War, (V of 1869, Section 114,) which is part of the Military Law: certain presumptions as to the relations of husband and wife provided by Section 21 of the Native Convert's Marriage Dissolution Act, (XXI of 1866), which are a portion of the law of marriage: a presumption of pre-emption in all Punjab Village communities, Act IV of 1872, Section 11: and a presumption in favor of a tenant's having a right of occupancy, Act XXVIII of 1868, Section 6. These and other similar presumptions must be considered not so much with reference to the law of Evidence as the special law regulating the subject in each case.

(2) "The question," says Mr. Taylor, "as to what amounts to recent possession varies according as the stolen article is or is not calculated to pass readily from hand to hand." Thus where the only evidence against a prisoner was that certain tools were traced to his possession three months after their loss, the Jury has been directed to acquit: in the same way possession of a horse six months after its loss, has been held not to justify a conviction for theft. Of course the presumption is very much weakened when actual possession is not proved, but stolen property is merely found in an accused person's house, as others may have placed it there. A similar presumption is raised by recent possession in the case of other offences: *e. g.*, in a case of arson, the fact of property, which was in the house at the time it was burnt, being soon afterwards found in the prisoner's house, was held to raise a presumption that he was present and concerned in the offence.—*Tayl.*, § 123.

The second part of the Illustration, 'as to Illustration (*a*)' gives an instance of circumstances under which recent possession raises no presumption of guilt.

(3) Section 133, *post*, provides that an accomplice shall be a competent witness, and that a conviction shall not be illegal merely because grounded on the uncorroborated evidence of an accomplice. The second part of the Illustration, as to (*b*), gives a case in which the Court might with propriety disregard the ordinary presumption of untrustworthiness raised in such cases.

(4) The English Law raises this presumption in the case of Promissory Notes and Bills of Exchange, "partly because it is important to preserve their negotiability intact, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves, and the deliberate mode in which they are executed."—*Tayl.*, § 127.

The same presumption would, of course, under ordinary circumstances, arise in the case of Promissory Notes, though they are not specifically referred to in the Illustration.

In the second part of the Illustration, the presumption that a Bill of Exchange was drawn for good consideration is rebutted by the fact that the relation of the parties is suggestive of unfair advantage. The effect of such relations was described in the recent case *Aylesford* v. *Morris*, in which the Lord Chancellor observed on the presumption arising "from the circumstances and conditions of the parties contracting—weakness on one side, extortion or advantage taken of that weakness on the other—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable." See also Section 111.

(5) The application of this presumption is expressly provided for, in certain cases, under Section 109.

(6) Some of these presumptions have been expressly provided for, as to documents, in Chapter v, Sections 79—90. The following instances are mentioned by Mr. Broom; "that a man, acting in a public capacity, was properly appointed and is authorized to do so: that Judges and jurors do nothing causelessly or maliciously: that facts, without which a verdict could not have been found, were proved at the trial: that the decision of a Court of competent jurisdiction was right," *Broom L. M.*, 849: so, that all proceedings of Parliament have been within the jurisdiction of the House and agreeably to the usages of Parliament. In England the presumption does not apply, says Mr. Taylor, "so as in any event to *give* jurisdiction to inferior Courts or to Magistrates or others acting judicially under a special statutory power; in all such cases, every circumstance, required by the Statute to give jurisdiction, must appear on the face of the proceedings, either by direct averment or by reasonable intendment."—*Tayl.*, § 126. No such provision being retained in the present Act, it is apprehended that a Judge would be at liberty, under this section, to presume jurisdiction in any case in which the circumstances did not raise a presumption to the contrary.

(7) "Thus, the receipt of rent after the expiration of an old lease raises a legal presumption of a new tenancy from year to year." Ser-

vants, where nothing to the contrary appears will be presumed to have been hired on the terms locally usual; letters are presumed to have been posted according to the Postmark; and a letter duly posted will be presumed to have reached its destination. See *ante*, Sections 16 and 88.

(8) So, in the case of a Trustee or Agent or other person liable to account, destroying accounts, or failing to keep proper accounts, the strongest presumption, which the nature of the case admitted of, would be made against him. So also where the person in command of a ship, affecting to be neutral, destroys her papers, there is presumption against her neutrality; in the same way on the principle that *omnia præsumuntur contra spoliatorem* where the finder of a lost jewel refuses to produce it, the presumption raised against him is that it is of the highest value of its kind; his conduct is attributed to the knowledge that the truth would operate against him.—*Tayl.*, § 101.

(9) As to the inference to be drawn from a witness' refusal to answer question as to character, see *post*, Section 148. See also Criminal Procedure Code, Section 343, as to inference from an accused person's refusal to answer.

(10) This presumption is already sanctioned by the Courts of this country. "A Bill having got back into the acceptor's hands is presumed to have been paid:—it is sufficient evidence of payment for the acceptor to produce the Bill."—*Shearman* v. *Fleming*, 5 *B. L. R.*, 635.]

CHAPTER VIII.

ESTOPPEL.

Estoppel.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

[So where members of a joint Hindu family, being aware of a transaction with the joint property by the Manager or one of their Body, acting ostensibly as owner, lie by, they cannot afterwards repudiate it.—1 *Norton's L. C.*, 202.

Thus, where beneficial owners permit the Benamidar to deal with the property as his own and borrow money on it, the beneficial owners cannot recover from the lender who has acted in good faith and obtained a decree in satisfaction of which the land is sold.—*Nundum Lal* v. *Taylor*, 1 *Suth., C. R.*, 37, *R. C.*

So a man, allowing goods to be supplied to a woman as his wife, cannot afterwards set up that she is not: and a woman, giving herself out as married to a man, and thus obtaining goods on credit, could not, on his bankruptcy, deny the marriage and claim the goods as her own. According to English Law a woman, to whom goods have been supplied on the strength of her representations that she was a single woman, may get rid of her liability by showing that at the time of the contract she was married; because, it is said, her misrepresentation does not affect her incapacity to contract. This exception is not preserved under the present law, and apparently, whenever a woman can be sued, she will be estopped under this section from denying any statement of hers by which she had succeeded in obtaining credit.

The same principle would apply in cases in which the belief was caused or allowed by a man's agent, acting within the scope of his duties; and this, although the principal was no party to the misrepresentation or concealment, or even was himself deceived.

Nor is it necessary, in order to create an estoppel under this section, that the person causing or permitting the belief of the other person, should himself have been aware of its untruth: he may have been acting unwittingly and in the most perfect good faith: if the belief has been intentionally caused and has been acted upon, the estoppel will come into force.—*Money* v. *Jorden*, 5 *H. L. C.*, 212. In considering whether a person has by his 'omission' intentionally caused or permitted a belief, it will be necessary to consider what, under the circumstances, was his duty as to disclosing the facts of the case. A man is not bound to go about telling everything to everybody, but he *is* bound to take reasonable precautions that his language and behaviour may not mislead those with whom he has to do. "If," said Lord Wensleydale, "whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon any person, by usage of trade or otherwise, to disclose the truth, may often have the same effect; as for instance, a retiring partner, omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorized."—*Freeman* v. *Cooke*, 2 *Ex. R.*, 654.

Three things are, therefore, necessary in order to bring a proceeding within the scope of this section; there must have been conduct which amounts to an intentional causing or permitting belief in another: these must have been belief on the part of that other, and there must have been action arising out of that belief. The House of Lords has ruled that the principle on which this section is grounded, does not apply to cases in which the representation is not a representation of fact, but a statement of something which the party intends to do or not to do. In a case in which an attempt was made to prevent a lady from enforcing a bond, which she had frequently avowed her intention of not enforcing, Lord Brougham pointed out the distinction between a statement of a then existing intention, which is liable

to the possibility of change hereafter, and a promise, the essence of which is to preclude future change. In the case under notice His Lordship considered that the lady's language and conduct did not amount to a promise not to change her then existing intention. "She simply stated what was her intention. She did not misrepresent her intention, and I have no manner of doubt that at the time she made that statement, she had the intention which it is stated she possessed." Lord St. Leonards in combating this view, maintained that "if you declare your intentions with reference, for example, to a marriage, not to enforce a given right, and the marriage takes place on that declaration, there is in point of law a binding undertaking."—*Money* v. *Jorden*, 5 *H. L. C.*, 210.

As to the estoppel of a legal representation, see *Natha Hari* v. *Jamni*, 8 *Bomb. A. C.*, 37.

"A similar doctrine," says Mr. Taylor, "prevails in Courts of equity; and it is there recognized as a well established rule, that if a party, having a secret equity, chooses to stand by and permit the apparent owner to deal with others as if he were the absolute owner, he shall not be permitted to assert such secret equity against a title founded on such apparent ownership.—*Tayl.*, § 771.

The Acceptor or Indorser of a Bill of Exchange would, it is apprehended, be precluded under this section, as against any person who had been induced by such acceptance or indorsement to regard the Bill as genuine, from denying its genuineness. As to the general estoppel affecting acceptors of Bills of Exchanges, see *post*, Section 117.]

Estoppel of tenant and licensee.

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

[But a tenant may show that his landlord had no title at a date previous to the commencement of his tenancy: or that since the commencement of the tenancy, the title of the landlord has expired or been defeated: as by showing that his landlord's estate was for the lifetime of some person, who is since dead; or that he was a tenant at will, and that the tenancy has been concluded.—*Tayl.*, § 89.

According to English Law the estoppel in cases of this class prevails, *while the tenant is in possession of the premises*: the present section extends it to the continuance of the tenancy.]

Estoppel of acceptor of bill of

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to

exchange, bailee or licensee.

endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

[According to English Law the acceptance of a Bill of Exchange is deemed a conclusive admission, on the part of the acceptor, of the signature of the drawer, and of his capacity to draw.—*Byles on Bills of Exch.*, 184. Under the present section the estoppel extends only to exclude a denial of the drawer's authority to draw or indorse; but the acceptor might, it would appear, be estopped from denying the genuineness of a drawer's signature, under Section 115, as against any person whom his acceptance had induced to accredit the Bill. But the acceptor of a Bill is not estopped from denying the signature of the payee, or of an endorsee.

As to the general duties and rights of bailees, see Contract Act, 1872, Chapter IX, Sections 148—179. The law, as laid down in the present section, appears to be less stringent, as regards the estoppel of a bailee, than that of England, according to which a bailee, who has once acknowledged the title of the bailor, is precluded from setting up the title of a third party to the article bailed, except in cases where the bailor has obtained the article fraudulently or tortuously from the third person, and where the bailee is able to show that he was, when he acknowledged the bailor's title, ignorant of the fraudulent or tortuous mode in which the article had been obtained, and also that the third party has made a claim to the article. A *pledgee* is, however, on a somewhat different footing. "It seems also," says Mr. Taylor, "that where a person pledges property to which he has no title, the pledgee is not estopped from delivering it to the rightful owner; for in the ordinary case of a pledge, the pledgor impliedly undertakes that the property is his own, and the pledgee merely undertakes that he will return it to the pledgor, provided it be not shown to belong to another. A common carrier, too, being bound to receive goods for carriage, and having no means of making inquiry as to their ownership, is at liberty to dispute the title of the person from whom he has received them; and if he be sued in trover by such person he may establish his defence by proving that he has delivered to the real owner on his claiming them.—*Tayl.*, § 777.

Under the present section a bailee sued by his bailor, would, it appears, in every instance be able to plead that the bailor's title was bad, and that he had delivered the article bailed to the rightful owner.]

CHAPTER IX.

OF WITNESSES.

Who may testify.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

[Act X of 1873 (Oaths Act, 1873) provides that Hindus and Mahummadans and all persons, who have an objection to an oath, shall make an affirmation instead of an oath. The Act further provides that a witness may offer to give evidence on oath in any form common amongst or held binding by persons of his race or persuasion, not repugnant to justice or decency, and not purporting to affect any third person, and that the Court may, if it think fit, tender such oath: and further, that, a party may offer to be bound by evidence given on any such oath, if taken by the opposite party; and that if in such a case the opposite party chooses to take it, the evidence so given shall be conclusive proof as against the person who offered to be bound.

There are various penalties, by which witnesses are compelled to accept service of summons, to come to Court, to speak the truth, and to produce documents when legally called upon to do so. As to these in Civil cases, see C. Civ. Pro., Sections 159, 167—171: and in Criminal Proceedings, Crim. Proc. Code, Chapter XXVI Sections 350—356; also I. P. C., Ch. X, Sections 172—180, but note that Section 178 is practically repealed by the Oaths Act, 1873. In addition to these penal provisions, a party aggrieved by the refusal of a witness to attend or to speak or to produce a document, has a Civil remedy. By Section 26 of Act XIX of 1853, any person to whom a Summons to attend and give evidence, or produce a document is personally delivered, and who, without lawful excuse, neglects or refuses so to attend, or who absconds in order to avoid service of the Summons, and any person who, when required by the Court to give evidence or to produce a document,

refuses to give evidence, or sign his deposition, or produce a document in his possession, is liable to the party, at whose instance the Summons was issued or the evidence required, for all damages, arising from such neglect, refusal or absconding, to be recovered in a Civil action.

An accused person may not be made a witness in his own trial, but may be examined by the Court; (C. P. C., S. 342) and the statement of one of several jointly-accused persons, implicating himself and some other of the accused, may be considered by the Court against all the co-accused, *ante*, Section 30.]

Dumb witness.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

[The same rule would, it is presumed, be applicable in the case of deaf or deaf and dumb witnesses, who might be communicated with by special signs, provided the Court was satisfied as to the reality and accuracy of such communication. Competence to understand the questions put to him and to give rational answers is, under Section 118, the one essential qualification for a witness. Deaf and dumb persons were formerly excluded as witnesses on the presumption of their idiotcy: it is now ascertained how groundless this presumption is.]

Married persons in Civil and Criminal Proceedings.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

[By Section 51 of Act IV of 1869, it is provided that any party may offer himself or herself as a witness and shall be examined and may be cross-examined like any other witness. Provision is also made for the parties verifying their cases by affidavit, and for the cross-examination of the party making the affidavit. Section 52 provides that, in petitions presented by a wife praying for dissolution of marriage on the ground of adultery coupled with cruelty or coupled with desertion without reasonable cause, the husband and wife respectively shall be competent *and compellable* to give evidence of or relating to such cruelty or desertion. These provisions suggest the inference that, except as provided, husbands and wives are not compellable, in suits to which they are parties, to give evidence. But a husband or wife who is not a party to the suit might, it is submitted, be compelled to give evidence. See Section 122.]

Judges and Magistrates.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(a.) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a Superior Court.

(b.) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.

(c.) A is accused before the Court of Session of attempting to murder a Police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Communications during marriage.

122. No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

[See note to Section 120.]

Evidence as to affairs of State.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Official communications.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Information as to commission of offences.

125. No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.

Professional communications.

126. No barrister, attorney, pleader or vakíl, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakíl by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:(1)

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any [*illegal] purpose;(2)

(2) Any fact observed by any barrister, pleader, attorney or vakíl in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [*pleader,] attorney or vakíl was or was not directed to such fact by or on behalf of his client.(3)

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a.*) A, a client, says to B, an attorney,—'I have committed forgery and I wish you to defend me.'

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

* See Act XVIII of 1872, Section 10.

(*b.*) A, a client, says to B, an attorney,—'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c.*) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

[(1) The communication, in order to be privileged, must have been in the course and for the purpose of the barrister's or other professional person's employment. Observations therefore which, though made during such employment, were not for the purpose of the employment, would not be privileged. Accordingly a remark by a prosecutor that "he would give a large sum to have the prisoner hanged," or a remark by a party after the completion of a compromise that "he was glad that he had settled it"—would, it seems, be without the scope of the section.

And where confidential communications were made to a lawyer, but, from some accidental cause, he was not employed, the communication has been held not to be privileged: the same would be the case with communications made previous to a professional person's employment, and, of course, with communications made to a man under an erroneous notion that he was an attorney.

It is not, however, necessary that there should have been "any regular retainer, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be, in any way, consulted in his professional character."—*Tayl.*, § 844.

Mere matters of observation unconnected with professional advice, are not protected. Thus an attorney may be asked as to his client's handwriting, even though his knowledge of it was gained in the course of his professional employment, or as to his identity, these being matters of independent observation.

When two parties employ a common solicitor, the protection extends only to such communications as are made by each to the solicitor in the character of his own solicitor, not to those made to him as solicitor for the other party—*e. g.*, A and B employ C as common solicitor to transact a sale. A, the purchaser, asks C to get the payment of the purchase money postponed; this communication is not protected because it was made to C, not in his capacity of A's own solicitor, but of B's.—*Perry* v. *Smith*, 9 *M. & W.*, 683.

No hostile inference should be drawn from a refusal to let a legal adviser disclose confidential communications: *Wentworth* v. *Lloyd*, (10 *Jur. N. S.*, 963,) where Lord Chelmsford distinguishes such cases

from those in which evidence is improperly kept out of the way and in which, accordingly, the presumption is against the wrongdoer. "The exclusion of such evidence is for the general interest of the community; and, therefore, to say that, when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection, which, for public purposes, the law affords him, and utterly to take away a privilege, which can thus only be asserted to his prejudice?"

(2) So where a party, having possessed himself of the Title-deeds of a deceased person, placed a forged Will of the deceased amongst them, and then sent the whole to his attorney, ostensibly for the purpose of asking his advice upon them, but really, as it seemed, that the attorney might find the Will and act upon it, the English Judges unanimously held that the attorney was bound to produce the Will on the trial of his client for forgery. Under the present Act such a communication would fall within proviso (1).

(3) The protection afforded by this section and Section 129 will be limited strictly to professional communications. It may be laid down generally, in the language of Lord Cranworth, "that there is no protection as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been written, in order to enable the person to whom they were addressed to communicate them in professional confidence to his solicitor."—*Tayl.*, § 842.

And so, if an attorney, by the direction of his client, makes a proposal to the opposite party, he may be compelled to disclose what he stated to that party, though he cannot divulge what his client had communicated to him.—*Ibid*, § 854.

So also an attorney can be compelled to discover to whom he parted with his client's Title-deeds, and in whose possession they are. So, for the purpose of letting in secondary evidence of the contents of a document, an attorney will be bound to answer whether it is in his possession or elsewhere in Court, even though he may have obtained it from his client in the course of communication with reference to the cause. And if an attorney attests an instrument which his client executes, he may be compelled to prove the execution.]

Section 126 to apply to interpreters, &c.

127. The provisions of section one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakíls.

[The provisions of Section 126 do not extend to agents, not being of the classes referred to in the section, sent out by a party to collect information for the purposes of the suit, although the intention may have been to put the information so collected before a solicitor. "There is no protection," said Lord Cranworth, "as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person, to whom they were addressed, to communicate them in professional confidence to his solicitor."—*Goodall* v. *Little*, 1 *Simons, N. S.*, 155.

Under the present section the test would be whether the person in question was the clerk or servant of a barrister, pleader, attorney or vakeel, or the clerk or servant of the party: in the latter case the section would not extend to him.]

Privilege not waived by volunteering evidence.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-six; and if any party to a suit or proceeding calls any such barrister, [*pleader,] attorney or vakíl as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, [*pleader,] attorney, or vakíl on matters which, but for such question, he would not be at liberty to disclose.

[By the old law a party, who gave evidence in a suit at his own instance, was deemed to have waved his privilege, and to have consented to disclosure by his professional adviser of any relevant matter, which the professional adviser would, but for such privilege, be bound to disclose. Under the present Act the mere fact of the party's giving evidence himself does not imply such consent: and if he calls the Barrister, &c., as a witness and questions him, he is deemed to consent to disclosure by the Barrister, &c., only if he questions him on matters which, but for such question, he would be bound not to disclose: and by giving evidence he does not expose himself to be questioned about professional communications except so far as is necessary to explain his evidence.]

Confidential communication with legal advisers.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

[Under the old law, Act II of 1855, Section 22, a party to a suit, who offered himself as witness, was bound to produce any confidential writing or correspondence that had passed between himself and his legal professional adviser: such correspondence need be produced, under the present section, only if it were necessary to explain the witness' evidence.]

* Added by Act XVIII of 1872.

Production of witness' title-deeds.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

[But the mere fact that the production of the document may render the witness liable to a civil action will not justify a refusal to produce a document: nor, apparently, will the fact that it exposes him to a forfeiture.

Where the witness is not compellable to produce his title-deeds, he cannot, of course, be compelled to answer questions as to their contents. See Section 91.

Witnesses who *are* parties to the suit do not appear to fall within the protection afforded by this section.

The witness should, however, bring the Document to Court, and the Judge will decide on the objection to its production. See Section 162. As to the lien of Attorneys and others on their client's papers, see Contract Act, 1872, Sections 171 and 221.]

Production of documents which another person, having possession, would be entitled to refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Witness not excused from answering on ground that answer will criminate.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind:

Proviso.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution,

or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

[As to punishment for refusal to give evidence, see I. P. C., Section 179; for giving false evidence, Section 193, I. P. C., and see Criminal Procedure Code, Schedule III, ("Alternative charges on Section 193)," from which it appears to be enough to show contradictory statements in order to secure a conviction. This is otherwise in England.—*Tayl.*, § 879.

A witness refusing to give evidence or produce a document is liable to a suit for damages under Act XIX of 1853, Section 26. See also Civil Procedure Code, Sections 169, 170.]

Accomplice.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[A Judge will, however, do properly in charging a Jury in such a case, to comment on the degree to which the evidence is in the particular case trustworthy or the reverse. His omission to do so, however, would not be an error of law, invalidating the conviction. In England it is usual for the Judge to advise the Jury not to convict on the uncorroborated evidence of an accomplice; and it is, as a general rule, regarded as a breach of duty for a Judge not to do so.

It would, of course, be only under some special circumstances that a conviction could be had on such evidence: but see Section 114(*b*.)

As to tender of pardon to an accomplice, see Criminal Procedure Code, Sections 347, 348 and 349.]

Number of witnesses.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

[According to English Law a person cannot be convicted of treason, but on the testimony of two witnesses, either both to the same, or one to one and another to another overt act of the same treason.—*Tayl.*, § 869. Nor in England in charges of perjury will the uncorroborated evidence of a single witness suffice.—*Id.*, § 876. No such rule applies under the present law; though, of course, it would be only under exceptional circumstances that a conviction could safely be grounded on such evidence.]

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

Order of production and examination of witnesses.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Civil and Criminal Procedure respectively, and, in the absence of any such law, by the discretion of the Court.

[As to commitments and convictions on evidence recorded partly by one officer and partly by another, see Criminal Procedure Code, Sections 328, 329.]

Judge to decide as to admissibility of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a.*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section thirty-two.

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(*b.*) It is proposed to prove by a copy the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(*c.*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may in its discretion either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d.*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination.

Cross-examination.

The examination of a witness, subsequent to the cross-examination, by the party who called him shall be called his re-examination.

Re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

Order of examinations. Direction of re-examination.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

[In America a witness can be cross-examined only as to circumstances connected with his examination-in-chief. If it is wished to examine him as to other matters, the party must make him his own witness and use him as a witness in his own case. No such restriction exists in England or under the present Act. As to further questions which may be asked in cross-examination, see Section 146.]

Cross-examination of person called to produce a document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

[By Section 153 of the Civil Procedure Code, a person, who is summoned merely to produce a document, is deemed to have complied with the summons if he cause such document to be produced instead of attending personally to produce it.]

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

Leading question.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

When they may be asked.

143. Leading questions may be asked in cross-examination.

[According to the American Law the Court has the power to stop leading questions being put in cross-examination to a witness who shows an obvious bias against the party who called him, and in favor of the cross-examiner.

Though this power is not conferred by the present law, a Judge is, of course, at liberty to intimate that, under the circumstances, the witness should be left to tell his own story, and, if this intimation is not complied with, to take it into account in estimating the value of the evidence. The right to ask leading questions does not mean that

an advocate is, in cross-examination, to put into a witness' mouth the very words which he is to echo back: nor ought he to assume as proved, facts which have not been proved, or evidence given which has not been given.—*Tayl.*, § 1288.]

Evidence as to matters in writing.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration.

The question is, whether A assaulted B.

C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

[This section merely points out the manner in which the provisions of Sections 91 and 92 as to the exclusion of oral by documentary evidencemay be enforced by the parties to the suit.]

Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

[The following caution is quoted from the observations of the Punjab Government on the Criminal Report for 1871 :—

"The contradictions and transparent falsehoods of witnesses often carry more weight with English Judges than is reconcilable with equity and a knowledge of the character of the people. A case may be in the main true, and would win on its merits alone, but an ignorant witness, doubtful of the procedure of the Courts, and anxious to make his story fit the opinion which he perceives the Judge has formed, embellishes it with imaginary incidents, which are dissipated under cross-examination, or contradicted by other witnesses, and the case is dismissed, the Judge believing, what is by no means necessarily correct, that a story must be false which the witnesses seek to establish with the assistance of falsehood. It is rather by a patient study of the character of the people and an intimate acquaintance with their habits and modes of thought, than by the application of general principles of evidence, that a Magistrate can hope to discriminate between truth and falsehood in an Indian Law Court."

It is, of course, often important that, when a witness is under cross-examination as to his previous statements, the fact of their having been reduced to writing should be concealed from him. It is only reasonable, however, that when he has given his answer, he should, before the document, which is to be used for the purpose of contradicting him, is proved, be allowed to see it, and have the chance of correcting himself. Questions under this section may, with the permission of the Court, be asked of the witness by the party who called him. Section 154.]

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

Questions lawful in cross-examination.

(1) to test his veracity;

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

[This does not mean that a witness may be asked questions on irrelevant topics for the mere purpose of contradicting him or of proving contradictory statements. For, unless in the case of the exceptions mentioned in Section 153, his answers to questions tending to shake his credit cannot be contradicted; nor by Section 155, can former contradictory statements be proved, unless that part of the witness' evidence, which they contradict, was itself liable to be contradicted.

Questions under this section may, with the permission of the Court, be asked of a witness when he is being examined-in-chief or re-examined. See Section 154. Accordingly, a party may, if the Court permits, discredit his own witness on general grounds, which he cannot do in England.

An Appellate Court ought to be very cautious in over-ruling the conclusion come to by an Original Court as to the credibility of witnesses. The Original Court is in a far better position than the Appellate Court to form a sound opinion on this point, and its judgment on it should be accepted by the Appellate Court, unless it is manifestly clear from the probabilities attached to certain circumstances in the case that the Original Court was wrong. See *Musadee Mahomed Cazam Sherazee* v. *Meerza Ally Mahomed Khan*, 6 *M. I. A.*, 28. "This Board never heard of an appeal being instituted on the ground that witnesses had been discredited: the Court below were aware of the character of those witnesses, and, besides the knowledge of their character, had the advantage of seeing their demeanour and behaviour, of which we on written evidence have no power of judging. We feel it our duty, therefore, to decide this case on the general principle that no appeal will lie from the judgment of a Court below on the ground that the Court discredited the witnesses produced to them by either party."—*José Santacana Aloy* v. *Jayine Ardeval*, 1 *Knapp*, 269.]

When witness to be compelled to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section one hundred and thirty-two shall apply thereto.

Court to decide when question shall be asked and when witness compelled to answer.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight

degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(4.) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

[The Court has the power either of prohibiting questions under this section, or of drawing or not drawing an inference from a witness' refusal to answer. The exclusions provided in (2) and (3) and in Sections 151, 152 indicate, with more distinctness than is to be found in the English Law, the principles on which the Court should proceed in protecting witnesses from reckless and unjustifiable interrogation. A witness is not to have his whole past life raked up and dragged into publicity merely because he comes forward in obedience to the law to give evidence in Court: so serious a private inconvenience can be justified only by a real necessity; and it is not so justified when either the imputation, if true, would not affect the witness' credibility, or when the injury to the witness' character is very serious, and the importance of the evidence very small. A woman who in some petty case is asked, "did you not twenty years ago have an illegitimate child?" has a right to be protected on the ground, 1st, that if she had, it does not affect her truthfulness; and 2nd, that it is not worth while to endanger her reputation for so trifling a cause.]

Question not to be asked without reasonable grounds.

149. No such question as is referred to in section one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(*a.*) A barrister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(*b.*) A pleader is informed by a person in Court that an important witness is a dacoit. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(*c.*) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(*d.*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

[The Illustrations show that the "reasonable grounds," which justify such questions, may be much slighter than would justify a man in making an imputation under other circumstances. A barrister who is told a discrediting fact by an attorney or vakíl, or a pleader who hears such a fact from a person who appears to know about it, is justified in so far assuming its truth as to question a witness about it; and he may even do so with no other justification than the witness' unsatisfactory replies.]

Procedure of Court in case of question being asked without reasonable grounds.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakíl or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakíl or attorney is subject in the exercise of his profession.

Indecent and scandalous questions.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Exclusion of evidence to contradict answers to questions testing veracity.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be

given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.(1)

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.(2)

Illustrations.

(*a*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b.*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c.*) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d.*) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

[(1) As to how a previous conviction is to be proved, see Sections 76 and 77.

(2) As *e. g.*, that the witness has been endeavouring to suborn witnesses against a party to the proceeding. This Exception goes further than the English Law, according to which a witness who denies acts indicating a hostile spirit, such as having tampered with the witnesses, having said that the prisoner should be acquitted if it cost him £20, &c., may not, according to the rulings, be contradicted.

Exceptions 1 and 2. Denial here must be taken as including refusal to admit. A witness who is asked, 'were you convicted last year of perjury?' or, "have you not received Rupees 50 from the defendant about this case? and says that he does not know or that he has forgotten, practically denies it."]

Question by party to his own witness.

154. The Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

[The person, therefore, who calls a witness, may, with the permission of the Court, ask him questions to show his general bad character; this is not permitted by the English Law.]

Impeaching credit of witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1.) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2.) By proof that the witness has been bribed or has [accepted][1] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3.) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;[2]

(4.) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.[3]

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted,[4] though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a.*) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(*b.*) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

[(1) The word "accepted" was substituted by Act XVIII of 1872 for the word "offered;" a very questionable change.

(2) That is, any part of his evidence that relates to a fact in issue or relevant otherwise than as affecting the witness' credit, or which falls within the Exceptions to Section 153.

e. g. A witness who has sworn to seeing a murder committed, and who has denied having been previously convicted or having received a bribe from either party, may be discredited by proof of his having made contradictory statement as to either of these points.

So if a witness' opinion is relevant as to sanity or identity, he may be asked if he has not expressed a contrary opinion; but where a witness has merely spoken to a fact, a previous expression of opinion by him as to the merits of the case is not relevant, and therefore if he denies having made it, he cannot be contradicted.—*Tayl.*, § 1300.

(3) The previous conduct of the prosecutrix might also, in such a case, be shown to be relevant under Section 8.

By the English Law it is necessary before giving evidence for the purpose of discrediting a witness to lay a foundation for the evidence to be given by the interrogation of the witness himself and his denial. This is not necessary under the present Act.

(4) It is, therefore, very dangerous in cross-examination to ask a witness his reasons for believing a witness to be untrustworthy. He is, by such a question, enabled to state any unfavorable fact without fear of contradiction.]

Questions tending to corroborate evidence of relevant fact, admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Former statements of witness may be proved to corroborate later testimony as to same fact.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

What matters may be proved in connection with proved statement relevant under Section 32 or 33.

158. Whenever any statement, relevant under section thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

Refreshing memory.

159. A witness may, while under examination, refresh his memory by referring to any writing[1] made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.[2]

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

[(1) A document used simply for the purpose of refreshing memory need not be admissible as evidence; a document, accordingly, inadmissible for want of a stamp or registration, may be used for this purpose.

(2) So a witness may refer to a log-book not made by himself but examined by him from time to time while the occurrences were recent, to depositions made by him in another Court, the correctness of which he ascertained at the time; to minutes made by another person which he has checked; or to a receipt which he has seen given.—*Tayl.*, § 1267.]

Testimony to facts stated in document mentioned in Section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

[Thus a solicitor who has made a parol lease and entered a memorandum of it in his book may refer to it though he has no independent recollection of the transaction: so a barrister to the notes on his brief in order to show that a witness has varied in his statement. So also a witness may look at his own attestation to a deed and say that from seeing it he is sure that he saw the party execute it, though he has no recollection of the fact.]

Right of adverse party as to writing used to refresh memory.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

[It is to be observed that it is only when a document is used for purposes referred to in Sections 159 and 160, that the adverse party has a right to see and cross-examine upon it; and, therefore, if a cross-examining council puts a paper into a witness' hands and asks him as to its general character or handwriting, the opposite party will not, on that account merely, be entitled to see it.

The English rule as to a document used to refresh a witness' memory, is that the opposite party may inspect the document and cross-ex-

amine the witness on such entries as have been already referred to without putting in the document as part of his own evidence: but that if he goes further and asks questions as to other parts he makes it his own evidence.—*Tayl.*, § 1270. No such distinction appears to be maintained by the present law. If the document is used for the purposes mentioned, the witness may be cross-examined upon it.]

Production of documents.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and if the interpreter disobeys such direction, he shall be held to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

Giving, as evidence, of document called for and produced on notice.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Using, as evidence, of document production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues B on an agreement and gives B notice to produce it. At

the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

Judge's power to put questions or order production.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under sections one hundred and forty-eight or one hundred and forty-nine; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

[And, therefore, a Judge ought, it would seem, not to ask any question, and certainly not to record an answer to any question which would be excluded by the provisions of Chapter VI.]

Power of jury or assessors to put questions.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

No new trial for rejection or improper reception of evidence.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

[This principle is acted upon by the Judicial Committee of the Privy Council. In *Lala Bandhidhar* v. *Government of Bengal*, 9 *B. L. R.*, 364, the Courts below having admitted evidence not properly admissible, the Judicial Committee examined the whole evidence, and being satisfied that, independent of the evidence improperly admitted, there was sufficient evidence to justify the decision of the Courts below, rejected the appeal.]

SCHEDULE.

Number and year.	Title.	Extent of Repeal.
Stat. 26, Geo. III, c. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled, An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a court of judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies), as requires the servants of the East India Company to deliver inventories to their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section thirty-eight so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15 Vic., c. 99.	To amend the Law of Evidence	Section 11 and so much of Sec. 19 as relates to British India.
Act XV of 1852	To amend the Law of Evidence	So much as has not been heretofore repealed.*
Act XIX of 1853	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.
Act II of 1855	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861	For simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I of 1868	The General Clauses Act, 1868	Sections seven and eight.

* Section 12 was preserved in force by Act XVIII of 1872, but both sections are repealed by the Indian Oaths Act, X of 1873.

APPENDIX.

LIABILITY TO DAMAGES FOR REFUSING TO GIVE EVIDENCE.

Act XIX of 1853, Section 26.

XXVI. Any person, whether a party to the suit or not, to whom a summons to attend, and give evidence or produce a document, shall be personally delivered, and who shall, without lawful excuse, neglect or refuse to obey such summons, or who shall be proved to have absconded, or kept out of the way to avoid being served with such summons, and any person who, being in Court and upon being required by the Court to give evidence, or produce a document in his possession, shall, without lawful excuse, refuse to give evidence, or sign his deposition, or to produce a document in his possession, shall, in addition to any proceedings under this Act, be liable to the party at whose request the summons shall have been issued, or at whose instance he shall be required to give evidence, or produce the document, for all damages which he may sustain in consequence of such neglect, or refusal, or of such absconding, or keeping out of the way as aforesaid, to be recovered in a civil action.

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19 & 20 Vict., Cap. 113.

An Act *to provide for taking evidence in Her Majesty's dominions in relation to Civil and Commercial matters pending before foreign tribunals.*

(*29th July* 1856.)

Whereas it is expedient that facilities be afforded for taking evidence in Her Majesty's dominions in relation to Civil and Commercial matters pending before foreign tribunals: Be it enacted

Order for examination of witnesses in this country in relation to any Civil or Commercial matter pending before a foreign tribunal.

I. Where, upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent Jurisdiction in a foreign country, before which any Civil or Commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said

Court or Judge, by the same order, or for such Court or Judge, or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such Court or Judge in a cause depending in such Court or before such Judge.

Certificate of ambassador, &c., sufficient evidence in support of application.

II. A certificate under the hand of the ambassador, minister, or other diplomatic Agent of any foreign power received as such by Her Majesty, or in case there be no such diplomatic Agent, then of the Consul General or Consul of any such foreign power at London, received and admitted as such by Her Majesty, that any matter in relation to which an application is made under this Act is a Civil or Commercial matter pending before a Court or tribunal in the country of which he is the diplomatic Agent or Consul having jurisdiction in the matter so pending, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified; but where no such certificate is produced other evidence to that effect shall be admissible.

Examination of witnesses to be taken upon oath.

III. It shall be lawful for every person authorized to take the examination of witnesses by any order made in pursuance of this Act to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorized: and if upon such oath or affirmation any person making the same wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury.

Persons giving false evidence guilty of perjury.

Payment of expenses.

IV. Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

Persons to have right of refusal to answer questions and to produce documents.

V. Provided also, that every person examined under any order made under this Act shall have the like right to refuse to answer questions tending to criminate himself, and other questions, which a witness in any cause pending in the Court by which or by a Judge whereof or before the Judge by whom the order for examination was made would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compelled to produce at a trial of such a cause.

Certain Courts and Judges to

VI. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's Colonies or possession abroad, and any

have authority under this Act.

Judge of any such Court, and every Judge in any such Colony or possession who by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be Courts and Judges having authority under this Act: Provided, that the Lord Chancellor, with the assistance of two of the Judges of the Courts of Common Law at Westminster, shall frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this Act, and regulating the procedure under the same.

Lord Chancellor, &c., to frame rules, &c.

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22 VICT., CAP. 20.

AN ACT *to provide for taking evidence in Suits and Proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunal.*

(19*th April* 1859.)

WHEREAS it is expedient that facilities be afforded for taking evidence in or in relation to Actions, Suits, and Proceedings pending before tribunals in Her Majesty's dominions in places in such dominions out of the jurisdiction of such tribunals: Be it enacted, &c.

Preamble.

I. Where, upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorized, by commission, order, or other process, the obtaining the testimony in or in relation to any Action, Suit, or Proceeding pending in or before such Court or tribunal of any witness or witnesses out of the jurisdiction of such Court or tribunal, and within the jurisdiction of such first mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such Commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same order, or for such Court or Judge, or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such Court or Judge in a cause depending in such Court or before such Judge.

Order for examination of witnesses out of the jurisdiction in relation to any suit pending before any tribunal in Her Majesty's possessions.

II. Every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury.

Penalty on persons giving false evidence.

III. Provided always, that every person whose attendance shall be so ordered shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

Payment of expenses.

IV. Provided also, that every person examined under any such commission, order or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the Court by which, or by a Judge whereof, or before the Judge by whom the order for examination was made, would be entitled to, and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause.

Power to person to refuse to answer questions to criminate himself, or to produce documents.

V. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's Colonies or possessions abroad, and any Judge of any such Court, and every Judge in any such Colony or possession who, by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be Courts and Judges having authority under this Act.

Certain Courts and Judges to have authority under this Act.

VI. It shall be lawful for the Lord Chancellor of Great Britain, with the assistance of two of the Judges of the Courts of Common Law at Westminster, so far as relates to England, and for the Lord Chancellor of Ireland, with the assistance of two of the Judges of the Courts of Common Law at Dublin, so far as relates to Ireland, and for two of the Judges of the Court of Session, so far as relates to Scotland, and for the Chief or only Judge of the Supreme Court in any of Her Majesty's Colonies or possessions abroad, so far as relates to such Colony or possession, to frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this Act and regulating the procedure under the same.

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22 & 23 Vict., Cap. 63.

An Act *to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof.*

(*13th August* 1859.)

Whereas great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof: Be it therefore enacted, &c.

Preamble.

I. If, in any action depending in any Court within Her Majesty's dominions, it shall be the opinion of such Court, that it is necessary or expedient, for the proper disposal of such action, to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law of such other part of Her

Courts in one part of Her Majesty's dominions may remit a case for the opinion in

law of a Court in any other part thereof.

Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of a Jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such Court or a Judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act; and it shall be competent to any of the parties to the action to present a petition to the Court whose opinion is to be obtained, praying such last mentioned Court to hear parties or their counsel, and to pronounce their opinion thereon in the terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the Court to which such petition shall be presented, shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the Court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper.

Opinion to be authenticated & certified copy given.

II. Upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion.

III. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the Court in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said Court shall thereupon apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a Jury; or the said last mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the Jury with the other facts of the case as evidence, or conclusive evidence as the Court may think fit, of the foreign law therein stated, and the said opinion shall be so submitted to the Jury.

Opinion to be applied by the Court making the remit.

Her Majesty in Council or House

IV. In the event of an appeal to Her Majesty in Council or to the House of Lords in any such action, it shall be competent to bring under review of Her Majesty in Council or of the House of Lords the opinion

of Lords on appeal may adopt or reject opinion.

pronounced as aforesaid by any Court whose judgments are reviewable by Her Majesty in Council or by the House of Lords, and Her Majesty in Council or that House may respectively adopt or reject such opinion of any Court whose Judgments are respectively reviewable by them as the same shall appear to them to be well founded or not in law.

Interpretation of terms.

V. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, Civil, Criminal, or Ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session, acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls and the Judge of the Admiralty Court and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein.

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24 VICT., CAP. 11.

AN ACT *to afford facilities for the better ascertainment of the law of foreign countries when pleaded in Courts within Her Majesty's dominions.*

(17th May 1861.*)*

Preamble 22 & 23 Vic., c. 63.

WHEREAS an Act was passed in the twenty-second and twenty-third years of Her Majesty's reign, intituled an Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof. And whereas it is expedient to afford the like facilities for the better ascertainment, in similar circumstances, of the law of any foreign country or State with the Government of which Her Majesty may be pleased to enter into a convention for the purpose of mutually ascertaining the law of such foreign country or State when pleaded in actions depending in any Courts within Her Majesty's dominions and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State: Be it therefore enacted, &c.

Superior Courts within Her Majesty's dominions may remit a case, with queries to a Court of any foreign State within which Her Majesty may have made a convention for that pur-

I. If, in any action depending in any of the Superior Courts within Her Majesty's dominions, it shall be the opinion of such Court, that it is necessary or expedient, for the disposal of such action, to ascertain the law applicable to the facts of the case as administered in any foreign State or country with the Government of which Her Majesty shall have entered into such convention as aforesaid, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of a Jury or other mode competent, or as may be agreed upon by the

pose, for ascertainment of law of such State.

parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such Court or a Judge thereof, such Court or Judge shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to such Superior Court in such foreign State or country as shall be agreed upon in said convention, whose opinion is desired upon the law administered by such foreign Court as applicable to the facts set forth in such case, and requesting them to pronounce their opinion on the questions submitted to them; and upon such opinion being pronounced, a copy thereof certified by an officer of such Court, shall be deemed and held to contain a correct record of such opinion.

Court in which action depends to apply such opinion to the facts set forth in cases, &c.

II. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with the Officer of the Court within Her Majesty's dominions in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said Court shall thereupon, if it shall see fit, apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a Jury; or the said last-mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the Jury with the other facts of the case as conclusive evidence of the foreign law therein stated, and the said opinion shall be so submitted to the Jury: Provided always, that if after having obtained such certified copy the Court shall not be satisfied that the facts had been properly understood by the foreign Court to which the case was remitted, or shall on any ground whatsoever be doubtful whether the opinion so certified does correctly represent the foreign law as regards the facts to which it is to be applied, it shall be lawful for such Court to remit the said case, either with or without alterations or amendments, to the same or to any other such Superior Court in such foreign State as aforesaid and so from time to time as may be necessary or expedient.

Courts in Her Majesty's dominions may pronounce opinion on case remitted by a foreign Court.

III. If, in any action depending in any Court of a foreign country or State with whose Government Her Majesty shall have entered into a convention as above set forth, such Court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of Her Majesty's dominions, and if the foreign Court in which such action may depend shall remit to the Court in Her Majesty's dominions whose opinion is desired a case setting forth the facts and the questions of law arising out of the same on which they desire to have the opinion of a Court within Her Majesty's dominions, it shall be competent to any of the parties to the action

to present a petition to such last-mentioned Court, whose opinion is to be obtained, praying such Court to hear parties or their Counsel, and to pronounce their opinion thereon in terms of this Act or to pronounce their opinion without hearing parties or Counsel; and the Court to which such petition shall be presented shall consider the same, and if they think fit, shall appoint an early day for hearing parties or their counsel on such case, and shall pronounce the opinion upon the questions of law as administered by them which are submitted to them by the foreign Court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper and upon such opinion being pronounced a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required.

Interpretation of terms.

IV. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, Civil, Criminal, or Ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session, acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls and the Judge of the Admiralty Court and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein; and in a foreign country or State, any Superior Court or Courts which shall be set forth in any such convention between Her Majesty and the Government of such foreign country or State.

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31 & 32 Vict., Cap. 37.

An Act *to amend the law relating to documentary evidence in certain cases.*

(25th June 1868.*)*

Preamble.

Whereas it is expedient to amend the law relating to evidence: Be it enacted, &c.

Short title.

I. This Act may be cited for all purposes as "The Documentary Evidence Act, 1868."

Mode of proving certain documents.

II. *Primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such Department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all Courts of Justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(1.) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

(2.) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or, where the question arises in a Court in any *British* colony or possession, of a copy purporting to be printed under the authority of the legislature of such *British* colony or possession.

(3.) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connexion with such department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

Act to be in force in Colonies.

III. Subject to any law that may be from time to time made by the legislature of any *British* colony or possession, this Act shall be in force in every such colony and possession.

Punishment of forgery.

IV. If any person commits any of the offences following, that is to say—

(1.) Prints any copy of any proclamation, order, or regulation, which falsely purports to have been printed by the Government printer, or to be printed under the authority of the legislature of any *British* colony or possession, or tenders in evidence any copy of any proclamation, order, or regulation which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or

(2.) Forges or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorized to be annexed to a copy of or extract from any proclamation, order, or regulation;

he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude for such term as is prescribed by the Penal Servitude Act, 1864, as the least term to which an offender can be sentenced to penal servitude, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Definition of terms.

V. The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such constructions; (that is to say)—

"*British* Colony and Possession" shall for the purposes of this Act include the *Channel Islands*, the *Isle of Man*, and such territories as may for the time being be vested in Her Majesty by virtue of any Act of Parliament for the government of *India* and all other Her Majesty's dominions.

"British Colony and Possession."

"Legislature" shall signify any authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for any colony or possession.

"Legislature."

"Privy Council" shall include Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the schedule hereto.

"Privy Council."

"Government Printer" shall mean and include the printer to Her Majesty and any printer purporting to be the printer authorized to print the Statutes, Ordinances, Acts of State, or other public Acts of the legislature of any *British* colony or possession, or otherwise to be the Government printer of such colony or possession.

"Government Printer."

"Gazette" shall include the *London Gazette*, the *Edinburgh Gazette*, and the *Dublin Gazette*, or any of such Gazettes.

"Gazette."

VI. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing Statute or existing at Common Law.

Act to be cumulative.

SCHEDULE.

Column 1.	Column 2.
Name of Department or Officer.	Names of Certifying Officers.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State	Any Secretary or Under-Secretary of State
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The Poor-Law Board	Any Commissioner of the Poor-Law Board or any Secretary or Assistant Secretary of the said Board.

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THE INDIAN CONTRACT ACT,

NO. IX OF 1872,

TOGETHER WITH AN

INTRODUCTION AND EXPLANATORY NOTES, TABLE OF CONTENTS, APPENDIX, AND INDEX.

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THE

CODE OF CRIMINAL PROCEDURE,

TOGETHER WITH THE LAWS RELATING TO

EXTRADITION, POLICE, AND PRISONER, &c.:

BEING

A COMPLETE MANUAL OF THE LAW OF PROCEDURE NECESSARY FOR POLICE AND MAGISTERIAL ENQUIRIES.

WITH

EXPLANATORY NOTES.

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